RECENT CASES

Bills and Notes—Negotiability of Note Indorsed to Holder Accompanied by Assignment of Conditional Sale Contract—Defendant contracted with seller to purchase a large mechanical press, and executed a conditional sale contract and a promissory note on the same piece of paper, separated by a perforated line. Seller assigned the contract and indorsed the note to plaintiff. Subsequently seller failed to deliver the press to defendant. Plaintiff sued on the note alone upon defendant's refusal to pay. The court awarded judgment to plaintiff as a holder in due course of a negotiable note. *Commercial Credit Corp. v. Orange County Mach. Wks.*, 208 P. 2d 780 (Cal. App., 2d Dist. 1949).

The negotiability of a note attached to a conditional sale contract depends on whether the promise to pay is rendered conditional by the contract provisions. There has been a decided split of authority on this problem. Those courts holding the note non-negotiable in the hands of the indorsee, who is also the assignee of the conditional sale contract, have done so on the theory that the promise to pay in the note is deemed to be conditioned on the payee's performance of his contractual duties,[1] since the two instruments are part of the same transaction and must be read together.[2] Those courts holding the note negotiable, on the other hand, have done so on the theory that each document is to be interpreted as a separate entity,[3] regardless of recitals on the notes that they are identified with the conditional sale contract.[4] Some authorities have gone so far as to say that even where the entire contract provisions have been incorporated into the note, the latter is negotiable.[5] In other decisions, the maker has defended on the ground that the accompanying assignment of the conditional sale contract prevented the indorsee from becoming a holder in due course. The courts have rejected this contention, pointing out that notice of an executory consideration does not so affect the indorsee's status.[6]

The decision in the instant case exemplifies the more logical approach to the solution of an unsettled problem. The only apparent purpose of the contemporaneous assignment of the conditional sale contract is for collateral security.[7] Where the note and the contract are separate documents

1. *E. g.*, First & Lumbermen's Nat. Bank v. Buchholz, 220 Minn. 97, 18 N. W. 2d 771 (1945); State Nat. Bank v. Cantrell, 42 N. M. 389, 143 P. 2d 592 (1943). See Aigler, *Conditions in Bills and Notes*, 26 MICH. L. REV. 471, 480, 495 (1928).

2. Von Nordheim v. Cornelius, 129 Neb. 719, 262 N. W. 832 (1935); Federal Credit Bureau v. Zelkor Dining Car Corp., 288 App. Div. 379, 264 N. Y. Supp. 723 (1st Dept. 1933).

3. *E. g.*, First State Bank v. Crain, 157 La. 427, 102 So. 513 (1924); Northwestern Finance Co. v. Crouch, 258 Mich. 411, 242 N. W. 771 (1932).

4. National Bond and Investment Co. v. Lanners, 253 Ill. App. 262 (1st Dist. 1928); Shawano Finance Corp. v. Julius, 214 Wis. 637, 254 N. W. 355 (1937).

5. Peoples Loan and Finance Co. v. Ledbetter, 69 Ga. App. 729, 26 S. E. 2d 671 (2d Div. 1943); Abingdon Bank & Trust Co. v. Shiplett-Moloney Co., 316 Ill. App. 29, 43 N. E. 2d 857 (2d Dist. 1942).

6. *E. g.*, Robertson v. Northern Motor Sec. Co., 105 Fla. 644, 142 So. 226 (1932); B. A. C. Corp. v. Cirucci, 131 N. J. L. 93, 35 A. 2d 36 (Sup. Ct. 1944).

7. Petroleum Acc. Corp. v. Queen Anne Laundry Service, Inc., 265 App. Div. 692, 40 N. Y. S. 2d 495 (2d Dept. 1943).

and both are transferred,[8] or where the note alone is indorsed,[9] references on the note to the contract do not make the promise conditional, unless the reference expressly states that payment is subject to the terms of the contract.[10] Logically, the attachment of the contract should not change this result for the net effect is merely to add specific information about the nature of the consideration for the note, and not to condition the promise of the note upon the payee's performance.[11] In the case of commercial buyers of financial substance and extensive business experience, there appears to be no valid policy against a holding of negotiability. However, in the case of consumers of low income and inferior bargaining position who are ignorant of the possible liabilities, negotiability might be an undesirable result, since the attachment of the contract and note might have prevented a realization by the buyer that he was signing what purports to be a negotiable note. Such a distinction, however, would be anomalous to the general policy of the NIL that negotiability should be determined with certainty by the content of the note itself,[12] absent any express qualifying reference to other writings, which policy is dictated by the business practice of regarding negotiable instruments as money. The more desirable solution of the problem of the consumer conditional buyer might be to require the vendor to disclose in writing to the buyer the full extent of his liability on the note to a holder in due course in the event of his default, enforcing the regulation by criminal sanctions.[13]

Conflict of Laws—Insurance Receivership—Assets in Ancillary State Delivered to Primary Receiver for Distribution—Assets of defendant insurance company, an insolvent New York Corporation, were located in Pennsylvania. The ancillary receiver in Pennsylvania recommended that these assets be distributed to Pennsylvania creditors only. New York's primary receiver requested the assets be turned over to him for equal distribution to all creditors everywhere, even though this would reduce the shares of Pennsylvania creditors. The Supreme Court of Pennsylvania, adopting the opinion of the lower court, ordered the assets delivered to the primary receiver, since it appeared that New York would make a pro rata distribution to all creditors wherever located. *Commonwealth v. Consolidated Indemnity & Insurance Co.*, 67 A. 2d (Pa. 1949).

8. *E. g.*, Cotton v. John Deere Plow Co., 246 Ala. 36, 18 So. 2d 727 (1944); Commercial Credit Corp. v. Summers, 154 Miss. 501, 122 So. 541 (1929); Continental Nat. Bank v. Conner, 214 S. W. 2d 928 (Tex. 1948).

9. *E. g.*, U. S. v. Bryant, 58 F. Supp. 663 (S. D. Fla. 1945), *aff'd*, 157 F. 2d 767 (5th Cir. 1946); Fowler v. Industrial Acc. Corp., 101 Fla. 259, 134 So. 60 (1931); Dorbrecker v. Downey Co., 88 Ind. App. 557, 163 N. E. 535 (1928); NEGOTIABLE INSTRUMENTS LAW § 3 (2). *But cf.* International Harv. Co. v. Watkins, 127 Kans. 50, 272 Pac. 139 (1928); General Motors Acc. Corp. v. Garrard, 41 Idaho 151, 238 Pac. 524 (1925).

10. Old Colony Trust Co. v. Stumpel, 247 N. Y. 538, 161 N. E. 173 (1928).

11. See proposed codification of this result, A. L. I. AND NAT'L CONFERENCE OF COM'RS ON UNIFORM STATE LAWS, UNIFORM COMMERCIAL CODE, ART. III, §§ 3-105 (1)c and (2)a, 3-120 (2), 3-304 (6)b (May 1949 Draft); Comment, 57 YALE L. J. 1414 (1948). Note, however, that the assignee is subject to the buyer's defenses against the seller in an action on the contract. First State Bank v. Crain, *supra;* Auto Brokerage Co. v. Ullrich, 4 N. J. Misc. 808, 134 Atl. 885 (Circ. Ct. Hudson Co. 1926). *Contra,* Commercial Credit Corp. v. Seale, 30 Ala. App. 440, 8 So. 2d 199 (2d Div. 1942).

12. See Aigler, *supra* note 1, at 495; Bailey, *Negotiable Instruments and Contemporaneously Executed Written Contracts,* 14 TEX. L. REV. 307 (1936).

13. See Note, 49 HARV. L. REV. 128 (1935).

Insurance companies are expressly excluded from national bankruptcy laws,[1] and liquidation is accomplished pursuant to state statute.[2] The typical statute appoints as primary receiver the Insurance Commissioner of the state of the company's residence,[3] but since each state in which assets are located has jurisdiction over those assets,[4] a primary receiver is not recognized by other than his own state except as a matter of comity.[5] Ancillary receivers are appointed in other states to collect funds located there, and these receivers may be directed to make distribution to claimants.[6] But many courts, aware of the convenience and saving of centralized administration,[7] are accustomed to remit assets from their own state to the insurer's domicile.[8] However, under this procedure creditors may have to prove claims in the state to which assets are remitted, and it is sometimes prohibitively expensive to prove a small claim at great distance.[9] The feeling has existed that there may be discrimination in the primary state,[10] even though such discrimination would be unconstitutional.[11] The Uniform Insurers Liquidation Act [12] resolves this conflict by providing that after two states have adopted the act, proof of claim in one state will be binding on the other and that the ancillary receiver shall release all assets to the primary receiver for distribution.[13]

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1. BANKRUPTCY ACT OF 1938, § 4(a), 52 STAT. 845, 11 U. S. C. § 22(a) (1946) amending BANKRUPTCY ACT OF 1898, 30 STAT. 547, 11 U. S. C. § 22(a) (1927).

2. Every state has some provision. See Comment, 33 COL. L. REV. 722, 724-726 (1933).

3. *See, e. g.,* PA. STAT. ANN. tit. 40 § 206 (Purdon, 1930).

4. Reynolds v. Stockton, 140 U. S. 254 (1891) (judgment against receiver in state court binds only such property as is within the state where judgment rendered).

5. *See, e. g.,* Boulware v. Davis, 90 Ala. 207, 8 So. 84 (1890); Castleman v. Templeman, 87 Md. 546, 40 Atl. 275 (1898); RESTATEMENT, CONFLICT OF LAWS § 564, comment *a* (1934); GOODRICH, HANDBOOK OF THE CONFLICT OF LAWS 589 (1949).

6. The analogy to administration of decedents' estates is pertinent. See Reynolds v. Stockton, *supra,* at 272. There is no preference to Pennsylvania creditors in the distribution of insolvent estates of Pennsylvania decedents. FIDUCIARY'S ACT OF 1917, PA. STAT. ANN. tit. 20 § 501 (Purdon, 1930); Instant case at 436.

7. See Brooks v. Smith, 290 Fed. 33, 39 (1st Cir. 1923); Bushwell v. Supreme Sitting of Order of Iron Hall, 161 Mass. 224, 235, 36 N. E. 1065, 1069 (1894).

8. The question is to be answered in the exercise of sound judicial discretion. Sands v. Greely & Co., 88 Fed. 130 (2d Cir. 1898); Receivers of Middlesex Banking Co. v. Realty Investment Co., 104 Conn. 206, 132 Atl. 390 (1926); RESTATEMENT, CONFLICT OF LAWS § 553 (1934); see Comment, 41 YALE L. J. 757, 758 (1932).

9. Matter of People (Norske Lloyd Ins. Co.), 242 N. Y. 148, 168, 151 N. E. 159, 166 (1926); see Comment, 41 YALE L. J. 757, 760 (1932).

10. Fawcett v. Supreme Sitting of Order of Iron Hall, 64 Conn. 170, 29 Atl. 614 (1894); *see* Carpenter v. Ludlum, 69 F. 2d 191, 193 (3d Cir. 1934), *cert. denied,* 292 U. S. 655 (1934).

11. U. S. CONST. Art IV, § 2; Blake v. McClung, 172 U. S. 239 (1898) (Tennessee statute giving Tennessee creditors priority held unconstitutional under clause assuring equal privileges and immunities to the citizens of the several states). The protection does not extend to corporations. See note 17 *infra.*

12. UNIFORM INSURERS LIQUIDATION ACT, HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, 232-239 (1939). Adopted by ten states. *See, e. g.,* ILL. ANN. STAT., tit. 73, §§ 833.1-833.13 (Smith-Hurd, 1940); MD. CODE SUPP., Art 48A, §§ 65A-65G (1947); MICH. COMP. LAWS, §§ 12270-11 to 12270-14 (Mason Supp. 1945); N. Y. INSURANCE LAW, §§ 517-524 (1939).

13. ". . . In the event a claimant elects to prove his claim in ancillary proceedings . . . the final allowance of such claim by the courts in the ancillary state shall be accepted as final. . . " HANDBOOK OF COMMISSIONERS, *op. cit. supra,* note 12, § 4(2), at 236; ". . . The ancillary receiver shall . . . promptly . . . transfer . . . to the domiciliary receiver (all assets after deducting secured claims and expenses)." *Id.* § 3(2), at 235.

The instant case, though an affirmation of cooperative practice already existing without sanction by the Pennsylvania court,[14] is a decided departure from that court's decision in 1903 refusing to remit assets to another state.[15] Although some courts require the posting of a bond to assure fair treatment of local creditors before remitting assets to another state,[16] no such security was here demanded. The Pennsylvania receiver refused to readjudicate claims of Pennsylvania creditors already proved in New York, thus indicating a clear disposition to regard proof of claims in other states as final. Likewise, the court was willing to remit funds to which a corporation made claim, even though corporations are not entitled to constitutional protection as to equal distribution.[17] This practice effectuates all but one important provision of the Uniform Act. There it is provided that no creditor can attach assets located in any state which has adopted the Act after primary proceedings have begun.[18] Two Pennsylvania decisions, however, indicate that attachment of assets of a foreign company gives a valid lien if attachment is made before the appointment of an ancillary receiver.[19] But the more recent opinion considers that this result is reached because the law of the other state would allow such attachment to the prejudice of Pennsylvania creditors.[20] The instant court declares itself opposed to any precedent which will encourage retaliation by other states against Pennsylvania creditors.[21] Thus, it follows that the court is also opposed to giving an attaching creditor priority over a primary receiver, for that same treatment would be accorded to Pennsylvania assets in another state. Clearly the court is disposed to cooperate where all creditors will be treated alike, and it would seem this would best be assured by adoption of the Uniform Act.

Constitutional Law—Equal Protection—Discrimination in Privately Owned State-Authorized Housing Project—Stuyvesant Town, a housing project, refused to rent to plaintiff because he was a Negro. Organized under the New York Redevelopment Law as a $90,000,000 subsidiary of the Metropolitan Insurance Company, the Town purchased eighteen blighted blocks condemned by New York City, and rehabilitated

14. *See, e. g.,* Commonwealth v. General Indemnity Corp. of America, Docket No. 222 (Pa. C. P. 1933); Commonwealth v. Keystone Mutual Casualty Co., Docket No. 129 (Pa. C. P. 1947).

15. Frowert v. Blank, 205 Pa. 299, 54 Atl. 1000 (1903) (refusal to remit based on belief that New York creditors would be preferred to Pennsylvania creditors). Distinguished in instant case at 437-438 on grounds that reasons justifying the decision no longer exist.

16. People v. Granite State Provident Ass'n, 161 N. Y. 492, 55 N. E. 1053 (1900); *cf.* Commissioner of Insurance v. National Life Insurance Co., 280 Mich. 344, 273 N. W. 592 (1937).

17. If claimant is a corporation, or not a citizen of a state, local creditors may be preferred without denying privileges and immunities or due process. Blake v. McClung, *supra;* GOODRICH, *op. cit. supra,* note 5, at 598.

18. HANDBOOK OF COMMISSIONERS, *op. cit. supra,* note 12, § 9, at 238.

19. Nazareth Cement Co. v. Union Indemnity Co., 116 Pa. Super. 506, 177 Atl. 64 (1935). Smith v. Electric Machine Co., 83 Pa. Super. 143 (1924).

20. "No rule of comity requires that Pennsylvania courts should direct that assets in Pennsylvania should be turned over to the receivers of a Louisiana Corporation. It might be so if Louisiana would do the same." Nazareth Cement Co. v. Union Indemnity Co., *supra* at 513, 177 Atl. at 67.

21. Instant case at 440.

the area into 8,400 low rental apartments.[1] Metropolitan agreed to assume all risks, the city agreeing to grant tax exemption for twenty-five years. Plaintiff's suit to enjoin the Town's refusal to admit Negroes was dismissed; the court held that Stuyvesant was a "private" activity, not subject to constitutional restraints upon discrimination. *Dorsey v. Stuyvesant Town,* 87 N. E. 2d 541, (Ct. of App., N. Y. 1949).

No state may, under the Fourteenth Amendment, deny its citizens equal protection of the laws; this prohibition has long been held to apply only to *state,* and not to *private* action.[2] Today expanded governmental participation in daily life makes it difficult to delineate the concept of state action, but a fundamental belief that rights founded upon the concept of human dignity are superior to rights founded upon the sanctity of property, has led the Supreme Court to broaden greatly the purview of the Fourteenth Amendment.[3] Thus, the following have been held unconstitutional state action: judicial enforcement of restrictive covenants between private individuals;[4] racial discrimination by a labor union which receives its bargaining rights by statute;[5] refusal of a privately owned town to permit the dissemination of religious tracts on its streets;[6] racial membership qualifications for a political party (even though declared to be a private activity by the legislature);[7] and racial qualifications for enrolling in the training school of a state subsidized, but privately endowed and controlled free library.[8] Throughout these decisions runs the thesis that a vast private organization, whose function is quasi public and whose discriminatory actions would affect many people, cannot do that which the states are forbidden to do under the Fourteenth Amendment.[9]

The instant court seemed to disregard this approach in determining whether Stuyvesant was a state or private organization. Its decision was based upon evidence of a legislative intent that the Town be completely free to choose its tenants, and upon a finding that there was no "direct" exertion of state power in the project. But declarations of legislative intent can neither lessen the scope of equal protection, nor alter the fundamental nature of Stuyvesant Town.[10] Moreover, under the decisions above, the extensiveness of governmental participation in the organization is less determinative than the number of persons whose constitutional rights are involved.[11] In this case, that figure is impressive because it includes not only Stuyvesant's 24,000 tenants, but the thousands more who dwell or may soon dwell in similar projects, provided for by twenty-four

1. N. Y. UNCONSOL. LAWS. tit. 11 § 3415 (McK. 1949). See also, *Metropolitan Makes Housing Pay,* 33 FORTUNE 133 (Apr. 1946).

2. U. S. CONST. AMEND. XIV, § 1; Civil Rights Cases, 109 U. S. 3 (1883). Dissenting vigorously, Justice Harlan objected to this narrowing of "equal protection," and declared that the "substance and spirit" of the Amendment was "sacrificed by a subtle and ingenious criticism," warning that great injustices would follow. *Id.* at 19.

3. Schlesinger, *The Supreme Court; 1947,* 35 FORTUNE 73 (Jan. 1947); PRITCHETT, THE ROOSEVELT COURT (1948).

4. Shelly v. Kraemer, 334 U. S. 1 (1948).

5. Steele v. Louisville & Nashville R. R., 323 U. S. 192 (1944); Betts v. Easley, 161 Kan. 558, 169 P. 2d 831 (1946).

6. Marsh v. Alabama, 326 U. S. 501 (1945).

7. Smith v. Alwright, 321 U. S. 649 (1944); Rice v. Elmore, 165 F. 2d 387 (4th Cir. 1947), *cert. denied,* 333 U. S. 875 (1948).

8. Kerr v. Enoch Pratt Free Library of Baltimore City, 149 F. 2d 212 (4th Cir. 1949).

9. See especially Marsh v. Alabama, *supra* at 506; Rice v. Elmore, *supra* at 390, 391; Smith v. Alwright, *supra* at 664.

10. *Cf.* Rice v. Elmore, *supra.*

11. See note 9 *supra.*

other states.[12] These ventures were authorized by legislatures to alleviate a public housing shortage, and only for this purpose may eminent domain be exercised in their construction.[13] Granting them immunity from the Fourteenth Amendment, and allowing them to exclude Negroes, permits them to ignore the most acute need for housing, since no other racial group in the nation is more in need of relief.[14] As long as the instant decision stands unreversed, states will be able to avoid giving aid to Negro citizens, while, simultaneously assisting the welfare of others. The inequities of such a result can hardly be explained by legal niceties.

Constitutional Law—Trusts—Validity of Retroactive Statute Authorizing Release and Termination by Beneficiary of a Spendthrift Trust—Life tenant, sole beneficiary of a spendthrift trust for over seventeen years, attempted, in accordance with a statute,[1] to disclaim her interest and thereby terminate the trust in favor of the remainderman. The action of the executor in opposing termination was sustained by the lower court. On appeal, the court affirmed on the ground that the statute, as affecting previously existing trusts, violated the state constitution by infringing on the testator's property right to have the trust carried out as directed.[2] In re *Borsch's Estate*, 67 A. 2d 119 (Pa. 1949).

It is generally accepted that no person may be compelled to accept a gift against his will[3] and that a person may therefore refuse to become the beneficiary of a spendthrift trust.[4] Once he has accepted, however, it has been held, in the absence of a statute such as that involved here, that the beneficiary cannot terminate the trust by releasing his interest since that would violate the testator's directions.[5] The problem of the validity of a statute authorizing termination of a spendthrift trust through release by the beneficiary, thus accelerating the remainderman's interest, is one of first impression. Analogous Pennsylvania legislation, involving

12. Petition of Appellant for certiorari to the Supreme Court, p. 23 (October, 1949). Some of these statutes expressly forbid discrimination.

13. N. Y. UNCONSOL. LAWS §§ 3402, 3420 (McK. 1949); Murray v. LaGuardia, 180 Misc. 760, 43 N. Y. Supp. 2d 408 (Sup. Ct. 1943). See Nichols, *The Meaning of Public Use in the Law of Eminent Domain*, 20 B. U. L. REV. 615, 631 (1940).

14. CLARK AND PERLMAN, PREJUDICE AND PROPERTY 12-14 (1948). It should be noted that granting plaintiff's injunction in this case would not mean that Stuyvesant is compelled to rent to all Negroes who seek admission. It is only the policy of refusing to rent to any Negro, which would be forbidden. No attempt was made in the instant case to urge that Stuyvesant was free to exclude Negroes as long as "separate but equal" facilities were provided for them elsewhere. Plessy v. Fergurson, 163 U. S. 537 (1896). This rule probably cannot be applied to housing projects because it would amount to racial zoning, which is unconstitutional under Buchanan v. Warley, 245 U. S. 60 (1917).

1. PA. STAT. ANN., tit. 68, § 581 (Purdon, Supp. 1946), amending Act of May 28, 1943, P. L. 792. The purpose of this statute was to allow beneficiaries of spendthrift trusts certain benefits under federal tax laws. Instant case at 123.

2. PA. CONST. Art. I, § 9, providing that a man cannot "be deprived of his life, liberty or property, unless by the judgment of his peers or the law of the land."

3. *In re* Bute's Estate, 355 Pa. 170, 49 A. 2d 339 (1946).

4. Matter of Graham, 145 Misc. 628, 260 N. Y. Supp. 585 (Surr. Ct. 1932); RESTATEMENT, TRUSTS § 36, comments c, d (1935); *see* Feeney's Estate, 293 Pa. 273, 284, 142 Atl. 284, 287 (1928); *cf.* Matter of Billet, 187 App. Div. 309, 175 N. Y. Supp. 482 (2d Dep't 1919). *Contra:* Porter's Estate, 21 Pa. Dist. 330 (1912).

5. Matter of Caswell, 56 N. Y. S. 2d 507 (Surr. Ct. 1944), *aff'd*, 269 App. Div. 809, 56 N. Y. S. 2d 407 (4th Dep't 1945); Malatesta's Estate, 29 Pa. Dist. 113 (1919); Blackwell v. Virginia Trust Co., 177 Va. 299, 14 S. E. 2d 301 (1941).

a modification of the testator's directions as to a spendthrift trust, provides that the beneficiary's interest can be reached for the support of his wife and children.[6] The constitutionality of that legislation as applied to trusts created before its passage has been upheld by the Pennsylvania Superior Court, which found that no vested rights were violated and that the act was a valid exercise of the state's police power.[7] Among the other jurisdictions, New York has taken the lead in passing statutes allowing creditors to reach part of the beneficiary's income.[8] The validity under the Federal Constitution of such legislation applied retroactively has been upheld.[9] The court reasoned that a spendthrift trust, in preventing alienation of the beneficiary's income to creditors, was similar to an exemption, in which there is no vested right, and that the legislation merely lessened the exemption.[10] Tennessee, on the other hand, has declared unconstitutional another statute reaching the beneficiary's income on the ground that it violates the beneficiary's vested right.[11] Pennsylvania appears to be the only jurisdiction which has found an "individual right of property" [12] in the *settlor,* and this decision is the first by a state supreme court to hold a statute unconstitutional because it violates that right.[13]

How such a right can be derived from the state due process clause is difficult to understand.[14] The instant court relies solely on the language of cases dealing with the right of a beneficiary to terminate the *spendthrift* provisions while retaining the income,[15] a clear violation of the testator's wishes. In this case, however, since the beneficiary could refuse the legacy originally, and since, as the court admits, he could probably refuse individual installments of income even after accepting,[16] there would seem to be no valid objection to allowing him to renounce altogether in favor of the remainderman.[17] Even assuming, however, that this does amount to a violation of the testator's wishes, the instant decision is unsatisfactory. Since the very right to dispose of property by will is a statutory rather than a natural right, any reasonable legislative modification of this right

6. PA. STAT. ANN., tit. 18, § 1252 (Purdon, 1930); PA. STAT. ANN., tit. 48, § 136 (Purdon, 1930).

7. Everhart v. Everhart, 87 Pa. Super. 184 (1926). The issue of the statute's constitutionality was before the Pennsylvania Supreme Court in Moorhead's Estate, 289 Pa. 542, 137 Atl. 802 (1927), but the court decided the case on other grounds.

8. N. Y. REAL PROP. LAW, § 98 (creditors allowed to reach "surplus" income); N. Y. CIV. PRAC. ACT § 684 (creditors allowed to reach ten per cent of income). Eight other states have statutes of the former and three of the latter type. GRISWOLD, SPENDTHRIFT TRUSTS, §§ 378-390.1 (2d ed. 1947).

9. Brearley v. Ward, 201 N. Y. 358, 94 N. E. 1001 (1911).

10. See GRISWOLD, SPENDTHRIFT TRUSTS, § 391 (2d ed. 1947).

11. State v. Caldwell, 181 Tenn. 74, 178 S. W. 2d 624 (1944). *See* Brearley v. Ward, *supra* at 377, 94 N. E. at 1008 (dissenting opinion).

12. Holdship v. Patterson, 7 Watts 547 (Pa. 1838). This language has been cited in many subsequent Pennsylvania spendthrift trust cases: *e. g.,* Heyl's Estate, 352 Pa. 407, 411, 43 A. 2d 130, 131 (1945); Riverside Trust Co. v. Twitchell, 342 Pa. 558, 561, 20 A. 2d 768, 770 (1941); Morgan's Estate (No. 1), 223 Pa. 228, 230, 72 Atl. 498, 499 (1909).

13. In Bonsall Estate, 65 Pa. D. & C. 251 (1948), which was followed by the lower court in the instant case, this statute was considered unconstitutional when applied retroactively, although the case was actually decided on the ground that the statute was not retroactive.

14. See note 2 *supra.* See also GRISWOLD, SPENDTHRIFT TRUSTS, § 393 (2d ed. 1947).

15. See note 12 *supra.*

16. Instant case at 121.

17. See Stern, J., dissenting in the instant case at 124.

should be valid.[18] This should be particularly true with respect to spendthrift trusts, which are supported more as a matter of policy than logic.[19] Although the statute declared unconstitutional here was repealed before this decision,[20] the instant case is important in that its rationale places serious limitations upon the power of the legislature to pass desirable legislation affecting existing spendthrift trusts.[21]

Criminal Law—Congressman Andrew May accepted pay from war-contract seekers allegedly for intervening with the War Department in their behalf. A federal penal statute prohibits the receipt of compensation by a Member of Congress for services rendered before a governmental agency.[1] In a criminal proceeding, instituted against May and the payors of the illegal compensation, Henry and Murray Garsson, all three were convicted of conspiring to violate the above statute and to defraud the United States. Convictions were likewise had on two counts which charged May with the substantive offense of illegally receiving compensation, and the Garssons with aiding and abetting May's offense. *May v. United States,* 175 F. 2d 944 (D. C. Cir. 1949).

Duplicity in the Indictment—The first count was brought for violation of the federal penal statute prohibiting conspiracy *either* to commit any offense against the United States, *or* to defraud the United States in any manner.[2] The count, however, charged in the conjunctive rather than the disjunctive, alleging substantially that the defendants had conspired to commit an offense,[3] *and* to defraud the United States.[4] The denial of defendants' motion to strike because of duplicity was affirmed on the ground that the conspiracy was only one offense regardless of its divers objects.

Traditionally, a single count charging more than one offense is duplicitous and therefore bad.[5] The purpose of the rule against duplicity seems to be founded on the theory of preventing prejudice to the accused.[6] Not only will the defendant find it difficult to prepare his defense, but a

18. "The right to transmit or to receive property by will or through intestacy is not a natural right but a creature of statutory grant." Tack's Estate, 325 Pa. 545, 548, 191 Atl. 155, 156 (1937). The inconsistency between the court's concept of a property right in the testator and the statement quoted is obvious. See also 1 PAGE, WILLS, § 25 (3d ed. 1941).

19. See GRISWOLD, SPENDTHRIFT TRUSTS, §§ 554, 555 (2d ed. 1947).

20. PA. STAT. ANN., tit. 20, § 301.3 (Purdon, Supp. 1948).

21. See note 8 *supra,* for examples of statutes which might be held unconstitutional under this rationale.

1. 18 U. S. C. § 203 (1946). "Whoever, being a Member of . . . Congress . . . receives . . . any compensation for any services rendered . . . in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter to which the United States is a party or . . . interested, before any department . . . shall be fined not more than . . ." This provision is now found in 18 U. S. C. § 281 (1948).

2. 18 U. S. C. § 88 (1946), now 18 U. S. C. § 371 (1948).

3. Violation of 18 U. S. C. § 203 (1946). See note 1 *supra.*

4. Defrauding here refers to usurping the government's right to have its officials act honestly.

5. See FED. R. CRIM. P. 8(a). Separate offenses must be charged in separate counts. *E. g.,* United States v. Dembowski, 252 Fed. 894 (E. D. Mich. 1918).

6. CLARK, CRIMINAL PROCEDURE 330 (2d ed., Mikell, 1918). Duplicity is error because defendant is subjected to confusion and embarrassment.

verdict on such a count will be ambiguous and confusing because it is never clear on which alleged offense the verdict was based. Since Congress has not made an express declaration of its intention in drafting the instant act, the courts have been left in the dark on the question of whether one or two offenses were contemplated. But from the inception of the statute, indictments have been brought that charged solely conspiracy to defraud,[7] or conspiracy to commit an offense,[8] and both in *separate* counts.[9] In *Sugar v. United States*[10] the court explicitly regarded conspiracy to defraud the United States as one of the separate and distinct offenses made punishable by the statute. An analysis of these cases results in the conclusion that the courts consider that Congress intended two different offenses and the inclusion of both in one count would make it duplicitous. But *United States v. Manton*[11] apparently departed from the above interpretation. The court there held only one offense was described in a count that charged both a conspiracy to defraud the United States and to violate a statute prohibiting the obstruction of the administration of justice.[12] The *Manton* holding admittedly was based primarily on *Frohwerk v. United States*[13] which seems to be poor precedent since the count in question there involved only a conspiracy to violate a single provision of the Espionage Act of 1917 and made no mention of a conspiracy to defraud. The instant decision, nevertheless, adopted the ruling of the *Manton* case in deciding that the count charged one offense.

In the present case the prosecution had offered evidence to prove the count as a whole, and the jury was charged that if it believed the defendants had conspired to defraud the United States or to violate the statute prohibiting a congressman from accepting a "bribe," it should convict. It is apparent in this case that the evidence necessary to prove a conspiracy to commit the offense would be the same as that necessary to prove a conspiracy to defraud. For a conspiracy involving the acceptance of a bribe by a congressman amounts to a conspiracy to infringe on the government's right to have its officials act honestly. Taking this view, defendants were not injured by the form of the first count. It cannot be said, however, that every indictment charging both a conspiracy to defraud and to commit an offense would be sustained. There is little

7. *E. g.*, United States v. Glasser, 116 F. 2d 690 (7th Cir. 1940), where defendants were charged only with conspiracy to defraud. United States v. Newton, 48 Fed. 218 (S. D. Iowa 1891); United States v. Thompson, 29 Fed. 86 (C. C. D. Ore. 1886).

8. *E. g.*, United States v. Holte, 236 U. S. 140 (1915); United States v. Britton, 108 U. S. 199 (1883). Defendants were charged only with conspiracy to commit an offense.

9. *E. g.*, McGregor v. United States, 134 Fed. 187 (4th Cir. 1904).

10. 252 Fed. 79, 83 (6th Cir. 1918). Where the defendants were charged with conspiracy to violate the Selective Draft Act of 1917 and to defraud the United States the court rejected the contention of duplicity because the charge of conspiracy to defraud had been considered surplusage from the outset of the litigation. See also Fuller v. United States, 114 F. 2d 698 (9th Cir. 1940).

11. 107 F. 2d 834 (2d Cir. 1938), *cert. denied*, 309 U. S. 669 (1939). The conspirators including Judge Manton were accused of conspiring to sell decisions and doing sufficient overt acts to accomplish the purpose of the conspiracy.

12. 18 U. S. C. § 241 (1946). ". . . who corruptly shall influence, obstruct, or impede . . . the due administration of justice . . . shall be fined . . . or imprisoned . . . or both."

13. 249 U. S. 204 (1919). The count charged the defendants with conspiracy to print in a newspaper twelve articles designed to obstruct recruiting by words of persuasion in violation of the act. 40 STAT. 217, 219 (1917), repealed by 62 STAT. 862 (1948).

doubt that the courts would strike down a count containing both where the evidence tending to prove one was different than that tending to prove the other.[14] In the event such a duplicitous count were allowed, the defendants would be subjected to serious prejudice. However, absent this prejudicial effect a patently duplicitous count may be upheld by the courts.

Applicability of Federal Aiding and Abetting Statute Where One of the Necessary Parties to a Criminal Act is Not Expressly Punished by the Statute Denouncing the Act—In affirming the conviction of the Garsson brothers as aiders and abettors the court held that the failure of the statute, prohibiting the illegal *receipt* of compensation by a congressman, to make express provision for the punishment of the *givers* of such compensation was no bar to the present indictment.

The federal penal code provides that one who aids, counsels, or procures the commission of a crime, as well as the actual offender, is punishable as a principal in the crime.[15] Appellants contend, however, that this provision has no application to an offense which requires concerted action by two persons, where the statute condemning the act expressly denounces one of the parties, without mentioning the other. The view that the unnamed participant is not punishable as an accomplice has been adopted by both federal and state courts in cases involving regulatory statutes, where the prohibited act was not inherently unlawful.[16] A California court took the same position with regard to a crime involving moral turpitude, holding that an unmarried woman was not indictable under the state adultery statute, since the statute provided for the punishment of married offenders only.[17] The United States Supreme Court applied this reasoning in reversing the conviction of a woman for conspiracy to violate the Mann Act.[18] It would therefore seem that when Congress fails to denounce one of the necessary parties to a prohibited act it reveals an intent to exculpate him. Nevertheless, the decision in this case allows indictment of the unnamed participant as an aider and abettor.

The instant court finds no evidence that Congress intended to make an exception to the general aiding and abetting statute in the case of the present offense. It rejects as inconclusive appellants' contention that, if the payor were meant to be punished, the legislature would have so pro-

14. Consider joining in one count, for example, conspiracy to commit murder on an Indian Reservation and to defraud the United States.

15. 18 U. S. C. § 550 (1946), now 18 U. S. C. § 2 (1948). This provision abolishes the common law distinction between principals and accessories before the fact.

16. *E. g.*, Lott v. U. S., 205 Fed. 28 (9th Cir. 1913) (Indian purchaser not chargeable with crime of soliciting and inciting offense of selling liquor to Indians); State v. Teahan, 50 Conn. 92 (1882) (state aiding and abetting statute does not apply to purchaser of liquor sold contrary to law); Com. v. Williard, 39 Mass. (22 Pick.) 47 (1839) (liquor purchaser not guilty of offense under local prohibition law).

17. *In re* Cooper, 162 Cal. 81, 121 Pac. 318 (1912). But see BISHOP, STAT. CRIMES § 659 (3d ed. 1901), where a contrary result is indicated in the absence of a fornication statute, as was the case here. *Cf.* Reg. v. Brawn, 1 Car. & Kit. 144 (Assize, 1843) (unmarried person convicted of aiding and abetting the offense of bigamy, though statute in express terms punished only the previously married partner). See Bishop, *op. cit. supra*, § 594.

18. The defendant was charged with consenting to her own interstate transportation for immoral purposes. The court, speaking through Mr. Justice Stone, said, at p. 123: ". . . we perceive in the failure of the Mann Act to condemn the woman's participation in those transportations, which are effected with her mere consent, evidence of an affirmative legislative policy to leave her acquiescence unpunished." Gebardi v. U. S., 287 U. S. 112 (1932).

vided, as it did in the adjacent code provision[19] where both the Member of Congress and the giver are expressly denounced for doing the very acts charged in the indictment here. The court might have pointed out that this argument leads to the opposite conclusion on the issue of the legislature's intent, by showing that Congress did not contemplate that the payor of illegal compensation should escape punishment for his part in the present transaction. Appellants' contention does, however, raise the further question as to the government's reason for indicting the Garssons with aiding and abetting the crime of another, when they might have been charged under the adjoining code section as violators in their own "right." A possible answer is found in the fact that such a charge might have precluded the conspiracy indictment, thus restricting the scope of the government's evidence.[20] The abuse, by prosecutors, of the conspiracy charge in order to make available less stringent rules of evidence has been under judicial fire for some time.[21] It would appear that the instant decision gives tacit approval to that practice by permitting a rather questionable use of the aiding and abetting charge.

Indictment for Conspiracy to Commit an Offense Which Requires Cooperative Action—In affirming the convictions, the court held that since only May could commit the substantive offense of "accepting compensation," the crime was not one requiring cooperative action, and therefore the defendants could be indicted as conspirators for their agreement to commit the offense.

It is well established that where two or more parties have committed an offense to which cooperative action is essential they may not be indicted for conspiracy to commit the offense. This doctrine has been applied in cases of dueling, bigamy, incest, adultery[22] and bribery.[23] It is reasoned that in such cases the conspiracy, *i. e.*, the agreement, is such an indispensable part of the substantive offense as to be merged in it. The instant court draws a distinction where a statute punishes only the conduct of one party to the illegal transaction. In *United States v. Holte*[24] a conviction was upheld against both a man and woman for conspiring to violate the Mann Act, the court reasoning that since a woman might possibly be "transported" while drugged or unconscious, the offense might be committed without her cooperation. This holding has been largely overruled by a later case[25] which reasoned that Congress intended to treat the women as victims and not as co-conspirators. In another case, a court reluctantly upheld the conviction of a bootlegger for conspiring with his purchaser to violate a prohibition statute which punished only the seller.[26] A conviction for conspiracy between a federal officer and a

19. 18 U. S. C. § 202 (1946), now 18 U. S. C. § 216 (1948).

20. This phase of the case is discussed in the following comment.

21. See note 30, *infra.*

22. 2 WHARTON, CRIMINAL LAW § 1604 (12th ed. 1932).

23. United States v. Dietrich, 126 Fed. 664 (C. C. Neb. 1904). *See* United States v. Katz, 271 U. S. 354 (1925); United States v. Zeuli, 137 F. 2d 845 (2d Cir. 1943). The doctrine is generally still applied although there are several givers on one side of the transaction and only one receiver on the other. *See* Thomas v. United States, 156 Fed. 898, 904 (8th Cir. 1907).

24. See note 8 *supra.*

25. Gebardi v. United States, *supra* note 18.

26. Vannata v. United States, 289 Fed. 424 (2d Cir. 1923). After referring to the scheme of indictment as an underhand way of doing something the legislature never thought of, the court went on to say, "This indictment was a great stretch on the part of the prosecutor of the quasi-judicial power lodged in him."

private citizen to violate a statute prohibiting the "acceptance" of bribes by federal officers has been affirmed,[27] but the court said it felt bound by the holdings in the Mann Act and the prohibition cases discussed above. The instant court, relying on these cases, rejected the doctrine that parties to a "cooperative crime" may not be indicted as conspirators and decided that "accepting compensation" did not require cooperative action so as to preclude prosecution of both the receiver and the givers for conspiracy.

Where confederation by criminals increases their power to work oppression, legislatures have imposed a penalty for conspiracy. The crime of conspiracy strikes at organized and syndicated crime.[28] However, where the cooperation involved is no greater than that necessarily required between the giver and receiver of a bribe, their power to work oppression does not materially increase and punishment for conspiracy seems unjustified. The degree of cooperation remains unchanged whether one or both parties to a collaborative crime are made punishable by the legislature. Since the hazards of confederation are no greater than before, the distinction drawn in this case is one without a real difference. Moreover, another federal statute specifically prohibits compensating congressmen for the procurement of government contracts,[29] making it perhaps unnecessary to charge a conspiracy to indict the Garssons for offering the compensation. A reasonable inference is that the purpose of the conspiracy count was to avail the prosecutor of the looser presentation of evidence allowed in conspiracy cases, a practice roundly condemned by many eminent jurists.[30] To the extent that this decision encourages the unnecessary use of such procedure, its propriety is doubtful. The court could have avoided this issue because the indictment charged a conspiracy with two objectives, the second being to defraud the United States and this requires no cooperative action. On this ground alone, the court could have reached the desirable result without crippling a sound doctrine by dissecting an otherwise indivisible transaction to find a crime where none existed previously.

Evidence—Constitutionality of Statute Limiting Admission of Prior Convictions—Defendant, on trial for murder, elected not to take the stand at the trial. Nevertheless, evidence of sixteen previous convictions for burglary was admitted over the defendant's objection that its admission was prohibited by the Pennsylvania Criminal Evidence Act of 1947.[1] The jury was instructed that it was to be considered only in the event of conviction, to aid them in determining whether to impose a sen-

27. *Ex parte* O'Leary, 53 F. 2d 956 (7th Cir. 1931), *cert. denied,* 283 U. S. 830 (1931).

28. For an illuminative discussion of the growth and justification for conspiracy punishments, see Sayre, *Criminal Conspiracy,* 35 HARV. L. REV. 393 (1922).

29. See note 19 *supra.*

30. *See* Krulewitch v. United States, 336 U. S. 440 (1948); United States v. Falcone, 109 F. 2d 579, 581 (2d Cir. 1900); Note, 62 HARV. L. REV. 276 (1948).

1. PA. STAT. ANN., tit. 19, § 711 (Purdon, Supp. 1948). "Section 1 . . . in the trial of any person charged with crime, no evidence shall be admitted which tends to show that the defendant has committed . . . any offense, other than the one wherewith he shall then be charged . . . unless,—One. . . . he has given evidence tending to prove his own good character . . . or, Two. He shall have testified at such trial against a co-defendant. . . . Three. The proof that he has committed or been convicted of such other offense is admissible evidence as to the guilt or the degree of the offense wherewith he is then charged." Only section three, above, is new. The rest of the act is a re-enactment of the 1911 act.

tence of death or life imprisonment. Defendant's conviction was affirmed on appeal, the court holding the act unconstitutional as being too vague.[2] *Commonwealth v. DePofi*, 362 Pa. 229, 66 A. 2d 649 (1949).

Pennsylvania in 1911 passed an act[3] similar to the English Criminal Evidence Act of 1898,[4] limiting cross-examination of the defendant as to prior crimes.[5] However, the provision of the English Act which allowed admission of prior crimes when relevant to issues other than the defendant's character was omitted. The Pennsylvania courts ignored the omission of this provision and, in accord with the general practice elsewhere, continued to admit such "independently relevant" evidence.[6] In 1928 in *Commonwealth v. Parker*[7] the Pennsylvania Supreme Court decided that the Act of 1925,[8] allowing juries to fix penalties at either death or life imprisonment in murder cases, implied that any prior conviction of a crime of violence would have "independent relevance" in a murder trial since it would aid the jury in determining whether to extend mercy.[9] The 1947 Act adopts the provision omitted in the 1911 Act. However, due to the decision of the Parker case,[10] Pennsylvania courts, without statutory authorization, had been admitting prior convictions as relevant to guilt, degree, or *sentence* while the new act makes them admissible only as to guilt or degree. Thus, while the act appears to give statutory sanction to the existing practice,[11] in fact it limits the practice by refusing to sanction admission of convictions as relevant to sentence.

While the courts threw the act out as vague, they seemed to be motivated by a policy based on the need to protect society from habitual criminals. It is difficult to see how the act could be vague since it was copied literally, with two minor changes,[12] from the English Act which

2. Also on the further grounds that (a) the title did not give notice of the contents of the act. The title is "An Act to amend . . . an Act regulating in criminal trials the cross-examination of a defendant . . . by further providing what evidence is or is not admissible." It is claimed that the failure of the title to specify that the act also prohibits affirmative proof of prior convictions is fatal. (b) Even if the title did give notice the act would be unconstitutional as containing more than one subject. It is here claimed that affirmative proof and cross-examination are different subjects within the meaning of the constitutional provission. ("No bill . . . shall be passed containing more than one subject, which shall be clearly expressed in its title." PA. CONST. Art. III, § 3.) The dissent answers by saying that there is one subject—"evidence of prior convictions."

3. PA. STAT. ANN., tit. 19, § 711 (Purdon, 1930).

4. Criminal Evidence Act, 1898, 61 & 62 VICT., c. 36.

5. At the time, it was felt that there was no need to extend the prohibition against evidence of prior convictions to direct examination due to the rule that the state could not initially attack the defendant's character. The 1947 act also applied to direct examination since Commonwealth v. Parker, 294 Pa. 144, 143 Atl. 904 (1928) opened the way to such direct attacks.

6. Commonwealth v. Coles, 265 Pa. 362, 108 Atl. 826 (1919) (not even citing the statute); *cf.* Goersen v. Commonwealth, 99 Pa. 388 (1882) admitting such evidence before Pennsylvania had any statute on this subject.

7. Commonwealth v. Parker, *supra.*

8. PA. STAT. ANN., tit. 18, § 4701 (Purdon, 1945).

9. *Contra:* People v. Witt, 170 Cal. 104, 148 Pac. 928 (1915); Farris v. People, 129 Ill. 521, 21 N. E. 821 (1889).

10. Commonwealth v. Parker, *supra.*

11. See Note, *Evidence of Defendant's Character in Pennsylvania Criminal Cases*, 96 U. OF PA. L. REV. 853 (1948) which says of the 1947 Act, "The General Assembly has merely given its approval . . . of the construction placed on the Act of 1925 [by the Parker case]."

12. One difference was that the English Act, like the 1911 Act, applied only to cross-examination. See note 5 *supra.* The English Act allowed evidence having independent relevance as to "guilt" while the Pennsylvania act applies to "guilt or degree." This is explained by the fact that there are no degrees of murder, nor of any other crime, in England.

had been successfully enforced for fifty years.[13] The court admits, "If we construe the Act of 1947 according to the canon of construction, that Act would prohibit the introduction in the trial of a person accused of murder, of evidence of any other crime for the purpose of fixing the appropriate penalty." Then, ignoring the practice in other states, it goes on to dismiss this construction on the ground that "the fixing of the penalty would therefore be largely an arbitrary matter." Though thirty-four states allow the jury to fix sentence in first-degree murder cases, only Pennsylvania has given the prosecution the right initially to bring the defendant's character into issue.[14] Having had to face the dilemma of either allowing a professional criminal to plead for mercy with a jury unaware of his record, or else admitting evidence which raises prejudice without proving guilt, Pennsylvania alone has accepted the latter choice.[15] The most satisfactory means for dealing with this problem would probably be the use of split verdicts, wherein the jury would receive evidence relevant to fixing sentence only after a verdict of guilty has been brought in.[16]

Income Taxation—Deductibility of Legal Expenses Incurred in the Determination of Gift Tax Liability—Taxpayer made a gift from income producing property and filed a gift tax return. He was notified of a deficiency and incurred legal expenses in effecting its substantial modification. Taxpayer then sued for a refund of overpayment of his income tax attributable to his legal expenses claiming their deductibility under § 23 (a) (2).[1] He contended that the deficiency assessment had been excessive and that it had threatened to consume most of his remaining income producing property. Taxpayer was allowed the refund and the provision of the Treasury Regulations[2] disallowing the deduction of gift tax determination expenses was held in conflict with § 23 (a) (2). *Lykes v. United States,* 84 F. Supp. 537 (S. D. Fla. 1949).

Section 23 (a) (2) was enacted to give investors the right to deduct expenses essential to the production of income.[3] Applicable Treasury Regulations originally disallowed the deduction of expenses incurred to

13. Criminal Evidence Act, 1898, 61 & 62 VICT., c. 36.

14. Pennsylvania allows the state to attack the defendant's character only in murder cases, since, character being relevant to sentence only there is no excuse for submitting prior convictions to the jury in other trials wherein the jury does not fix sentence. The only analogy to this, wherein the jury gets the defendant's record, is the practice under some Habitual Offender's Acts, providing additional sentences for repeated violations. However, such a practice is adopted in a minority of jurisdictions and never applies in any crime as serious as murder.

15. There have been sporadic attempts to limit the admission of such evidence. *E. g.,* Commonwealth v. Clark, 322 Pa. 321, 185 Atl. 764 (1936) ("only [against] professional criminals . . . or where the murder is cold-blooded or atrocious").

16. 1 WIGMORE, EVIDENCE § 194b (3d ed. 1940). The Revised Penal Code (Senate Bill 243) provided for such split verdicts in Pennsylvania murder cases. However, this bill was vetoed on other grounds. See Legal Intelligencer, May 3, 1949.

1. INT. REV. CODE § 23(a) (2) provides that an individual may deduct from gross income "all the ordinary and necessary expenses paid or incurred during the taxable year for the production or collection of income, or for the management, conservation, or maintenance of property held for the production of income."

2. U. S. Treas. Reg. 111, § 29.23(a)-15(b) (1943), as amended by T. D. 5513, 1946-1 CUM. BULL. 61, 62. See note 8 *infra.*

3. H. R. REP. No. 2333, 77th Cong., 2d Sess. 46, 74-76 (1942); SEN. REP. No. 1631, 77th Cong., 2d Sess. 87 (1942); 87 CONG. REC. 7346 (1941); 88 CONG. REC. 6376 (1942). For a thorough discussion of the genesis of § 23(a) (2) see Brodsky & McKibbin, *Deduction of Non-Trade or Non-Business Expenses,* 2 TAX L. REV. 39, 40-44 (1946).

contest proposed additional tax assessments.[4] The Supreme Court in *Bingham's Trust v. Commissioner*[5] held that this provision was inconsistent with § 23 (a) (2) because it did not give proper effect to the words "for the management, conservation, or maintenance of property held for the production of income." In that case trustees, after expiration of the trust, contested an income tax deficiency. The Court, taking the view that trust property is held for the production of income until the distribution of trust assets is complete, allowed the deduction of their legal expenses because they were a proximate result of the management of property held to yield income.[6] The Treasury Regulations have since been amended to conform with the Supreme Court's interpretation of § 23 (a) (2).[7] To forestall a more liberal construction of § 23 (a) (2) based on the word "conservation" they now provide that the expenses of contesting any liability shall not become deductible because income producing property may be consumed in satisfaction of it. Gift tax contest expenses are excluded as an illustration of this provision.[8] Its validity was questioned in *Cobb v. Commissioner*[9] where the provision was sustained on consideration of the language and purpose of § 23 (a) (2). The Tax Court in that case answered the contention that the gift tax litigation expenses involved were incurred in an attempt to conserve income producing property. It said that expenses incurred in the defense of any alleged liability which might result in a forced sale of income producing property to satisfy such liability would be deductible if the argument should prevail.[10] The circuit court in affirming the Tax Court distinguished the *Bingham* case declaring it to be no authority for the proposition that gift tax litigation expenses are deductible on the ground that income producing property was protected by their expenditure.

In the instant case the district court without sufficient explanation relies on the *Bingham* case as authority for allowing the deduction of the gift tax determination expenses. The applicability of the *Bingham* case is doubtful. In that case the income tax litigation expenses were held to be a proximate result of the holding of property for income purposes by trustees, whereas in the instant case, the gift tax litigation expenses seem to have been the proximate result of the voluntary distribution of income producing property by an individual.[11] Thus, there is

4. U. S. Treas. Reg. 111, § 29.23(a)-15(b) (1943). An exception was made in the case of taxes on property held for the production of income.

5. 325 U. S. 365 (1945). See Brodsky & McKibbin, *supra* note 3, at 55 *et seq.*; Note, 97 U. OF PA. L. REV. 251, 256 (1948).

6. Bingham's Trust v. Comm'r, *supra*, at 367. The Court applied the test of Kornhauser v. United States, 276 U. S. 145 (1928) that an expense is deductible if directly connected with or proximately resulting from the enterprise. That test is now applicable to the "business" and "non-business" provisions of § 23(a).

7. T. D. 5513, *supra* note 2. They now provide that all expenses incurred in the determination of income tax liability are deductible. It has been submitted that this provision exceeds the authority of § 23(a)(2), but is justifiable on the ground of administrative expediency. Brodsky & McKibbin, *supra* note 3, at 60, 64.

8. T. D. 5513, *supra* note 2. An exception is made in the case of expenses allocable to interest on a refund of gift taxes.

9. 10 T. C. 380 (1948), *aff'd*, 173 F. 2d 711 (6th Cir. 1949), *cert. denied*, 18 U. S. L. WEEK 3088 (U. S. Oct. 10, 1949).

10. *Id.* at 384. Thus, the Tax Court in this case unequivocally abandoned its former position with regard to the "conservation" argument. That argument had been sustained in Bingham's Trust v. Comm'r, 2 T. C. 853, 859 (1943), along with the "management" argument; and in Connelly v. Comm'r, 6 T. C. 744, 748 (1946).

11. *Cf.* Bagley v. Comm'r, 8 T. C. 130, 135 (1947) (denied deduction of expenses for advice concerning the establishment of a trust for benefit of taxpayer's minor daughter).

no doubt that any expense incurred in the production of income is deductible, but one which is not incident to any activities for that purpose may not be deducted. If the instant decision rests on the ground that the taxpayer acted to conserve income producing property by contesting the excessive deficiency assessment, the deductibility of all the defense expenses that would logically come under § 23 (a) (2) would turn solely on the coincidence of the taxpayer's owning income producing property. This would attribute to Congress an intent to discriminate which would result in a more serious injustice than that discussed at some length by the district court in the instant decision.[12]

Income Taxation—Deductibility of Penalty as "Ordinary and Necessary" Business Expense—Petitioner voluntarily disclosed innocent violations of price ceilings to the OPA. Unable to recompense his customers, petitioner paid the Administrator the amount of the overcharges. The Commissioner disallowed deduction on income tax statement of the payment. In a suit for refund, the court upheld the petitioner's claim that it was deductible as an ordinary and necessary business expense because this allowance did not frustrate the policy of the OPA statute. *Jerry Rossman Corp. v. Commissioner,* 175 F. 2d 711 (2d Cir. 1949).

Section 23 (a) (1) (A) of the Internal Revenue Code allows deductions from gross income of "ordinary and necessary" business expenses. This broad allowance has been held to include civil judgments [1] as well as legal expenses incurred in defending or initiating civil suits when they arise in the course of business.[2] However, courts have excluded from this deduction expenditures to accomplish objectives in frustration of governmental policy.[3] Torts against the Government which are also crimes give rise to non-deductible judgments or penalties.[4] Moreover, until this decision courts have uniformly held that no *penalty* is deductible [5] rationalizing that the expenditure was not one necessary to obtain profits,[6] that since it was an illegal act it could not be necessary,[7]

12. Taxpayer had been notified of a deficiency of $145,276.50, and of his right to petition for a redetermination within 90 days, under § 1012 of the Code. The modified deficiency was $15,612.75. In view of the excessiveness of the assessment and the rigidity of the procedure under § 1012 the taxpayer was actually compelled to incur legal expenses amounting to $7,263.83, in order to protect himself from a lien against his property. In reference to § 23(a) (2) the district court said: ". . . to hold that such law denies taxpayer the right to contest such assessment, except at his own personal expense, just isn't justice under the law." The circuit court in the *Cobb* case, *supra,* recognized a similar injustice in the case before it, but holds that § 23(a) (2) cannot remedy it.

1. *E. g.,* Helvering v. Hampton, 79 F. 2d 358 (9th Cir. 1935).

2. *E. g.,* Kornhauser v. United States, 276 U. S. 145 (1928).

3. *E. g.,* Textile Mills Securities Corp. v. Commissioner, 314 U. S. 326 (1941) (lobbying expenses); Wagner v. Commissioner, 30 B. T. A. 1099 (1934) (losses sustained by confiscation by District Attorney of usurious loan office's records).

4. Standard Oil Co. v. Commissioner, 129 F. 2d 363 (7th Cir. 1942).

5. *E. g.,* Burroughs Building Material Co. v. Commissioner, 47 F. 2d 178 (2d Cir. 1931).

6. *E. g.,* Burroughs Building Material Co. v. Commissioner, *supra,* which relied on Inland Revenue Comm. v. von Glehn, [1920] 2 K. B. 553.

7. National Outdoor Advertising Bureau, Inc. v. Helvering, 89 F. 2d 878 (2d Cir. 1937).

or that allowance would mitigate the force of the penalty.[8] "Penalty" has been generally held to include all non-tax payments to federal and state governments for statutory breaches which are not contractual.[9] Moral character of the breach was considered irrelevant[10] as was the practical difficulty of perfect compliance.[11] In these cases attorney's fees had been allowable only in so far as the defense was successful.[12] The tide of the law shifted sharply when the Supreme Court held deductible attorney's fees for an unsuccessful defense of a penal action arising in the course of business as long as the deduction did not frustrate the policy of the statute imposing the penalty.[13] It was not thought that this meant the penalties themselves were deductible,[14] but in the instant case the court used the policy maintenance principle to hold deductible this payment for an *innocent* overcharge which it reluctantly termed a penalty.

Different policy considerations arise in allowing deduction of costs of an unsuccesful defense against a penalty and in allowance of the penalty itself. Since it is fundamental that an accused is innocent until proved guilty, legal expenses incurred in his defense are presumptively costs of warding off an unjustified judgment. When an appellate court grants cognizance of a dispute there is sufficient merit in the case to warrant the defendant's resistance. Good faith, the severity of the penalty, and the interests of society served by an authoritative interpretation of unsettled law are all good reasons for imposing no further expense upon the defendant.[15] On the other hand, penalties are exactions by the sovereign for unlawful conduct and warrant no mitigation in their effect. To so hold would lessen their sanction, thus weakening an effective method of enforcing social policy. Even if we accept the principles laid down by this court the decision is still unjustified. The Emergency Price Control Act of 1942 states as its purpose the prevention of inflation.[16] Any surcharge in a sale reduces purchasing power which is in direct conflict with the policy of the Act. Although the unlawful excess profit was siphoned off by payment of the penalty to the government, the original inflationary pressure on the consumer remained.[17] Allowance of the deduction here lets this breach of policy go unpunished since all that was paid to the government was the unjustified surcharge.

8. Great Northern Ry. v. Commissioner, 40 F. 2d 372 (8th Cir. 1930).

9. *E. g.*, United States v. LaFranca, 282 U. S. 568, 573 (1931); United States v. Jaffrey, 97 F. 2d 488 (8th Cir. 1938) (assessment on delinquent taxes); Gould Paper Co. v. Commissioner, 72 F. 2d 698 (2d Cir. 1934) (state anti-trust law); Chicago, R. I. & P. Ry. v. Commissioner, 47 F. 2d 990 (7th Cir. 1931) (Hours of Service Law, Safety Appliance Law, etc.). *Contra:* Amato v. Porter, 157 F. 2d 719 (10th Cir. 1946).

10. Helvering v. Hampton, *supra;* Burroughs Building Material Co. v. Commissioner, *supra.*

11. For a broad treatment of the whole problem, see Note, 54 HARV. L. REV. 852 (1941).

12. National Outdoor Advertising Bureau, Inc. v. Helvering, *supra* (Anti-Trust action, part of prosecution dropped, part settled by compromise, legal expenses deductible only as to former part).

13. Commissioner v. Heininger, 320 U. S. 467 (1943) (suit to enjoin fraud order prohibiting further use of mails for "puffing" advertising of mail-order prosthetics firm. The Court said the policy of the penalizing Act was to prevent fraud by the mails and the deduction allowance in no way frustrated it).

14. Commissioner v. Longhorn Portland Cement Co., 148 F. 2d 276 (5th Cir. 1945).

15. Commissioner v. Heininger, *supra.*

16. 56 STAT. 23 (1942), 50 U. S. C. APP. § 901(a) (1946).

17. Had the payment been made to petitioner's customers no inflationary pressure would have resulted and the commissioner would have allowed the deduction. I. T. 3630, 1943 CUM. BULL. 113.

While it is not the function of taxation to impose a penalty, it is certainly not the function of the courts to remove the naturally resulting punitive force from penalties imposed for acts contrary to public policy. Penalties for violation of OPA have been held not deductible before without regard to the petitioner's moral conduct,[18] but this court maintains that deductions may be made when the overcharges are not wilfull or negligent, thus rendering mens rea significant in an offense condemned in the statute as malum prohibitum.[19]

Income Taxation—Includibility as Income of Deposits for Security, Future Rent or Part Payment for Property Under an Option to Purchase—Petitioner leased property for ten years. The lease provided for deposits of money as security for the lessee's performance of his obligations. The deposits, if not needed as security, were to be applied to the last month's rent, or as a part payment for the property under an option to purchase obtained with the lease. Petitioner reported the payments received as income when it became ascertained that they would be applied as rent. The court upheld the Commissioner's contention that the proceeds were taxable income when received, on the theory that not only had taxpayer the unrestricted use of the proceeds, but also he was not required to refund them, and only upon a contingency would they become anything but rent. *Gilken Corp v. Commissioner,* 176 F. 2d 141 (6th Cir. 1949).

Payments to be applied to future rent have been held taxable income when received, whether taxpayer is on a cash or accrual basis,[1] under the "claim of right" doctrine.[2] However payments held solely as security have been held not taxable when received, since it is not known whether they will ever become income.[3] Likewise payments toward the purchase price of the property, under an option to purchase, are not generally held taxable income when received, since it cannot be told whether the payments are income or a return of capital until it is known that the option will or will not be exercised.[4] Where payment is made as a credit against future rent and as security, no general principle can be laid down. In *Clinton Hotel v. Commissioner,*[5] payment labeled "security" was held not taxable income when received, since as a security payment it might never

18. Garibaldi & Cuneo v. Commissioner, 9 T. C. 446 (1947); Scioto Provision Co. v. Commissioner, 9 T. C. 439 (1947).

19. The decision can be criticized also for the practical burden it throws on tax commissioners who must dispose of deduction pleas for penalties imposed by the numberless agencies of federal and state governments.

1. Commissioner v. Lyon, 97 F. 2d 70 (9th Cir. 1938); Astor Holding Co. v. Commissioner, 135 F. 2d 47 (5th Cir. 1943).

2. This doctrine was first stated by Justice Brandeis in North American Oil Consolidated v. Burnet, 286 U. S. 417, 424 (1932), as follows: "If a taxpayer receives earnings under a claim of right and without restriction as to its disposition, he has received income [for tax purposes], even though it may still be claimed that he is not entitled to retain [it], and even though he still may be adjudged liable to restore its equivalent."

3. Warren Service Corp. v. Commissioner, 110 F. 2d 723 (2d Cir. 1940).

4. Hunter v. Commissioner, 140 F. 2d 954 (5th Cir. 1944); Virginia Iron, Coal and Coke Co. v. Commissioner, 99 F. 2d 919 (4th Cir. 1938), *cert. denied,* 307 U. S. 630 (1939).

5. 128 F. 2d 968 (5th Cir. 1942).

become income. This case has not been followed,[6] probably because it is felt that merely using the term "security" is not sufficient to alter its character as prepaid rent. Thus, in another leading case, the court refused to accept the label, determining that the payment was taxable income when received on the basis of a finding that the payment was primarily intended as future rent.[7]

The court in the instant case was faced with a difficult problem. The payments could eventually have become either rent, taxable when received, or a return of capital, not taxable as income at all.[8] The court reasoned that since the taxpayer had the unrestricted use of the proceeds it was taxable when received. This rationale affords no logical basis for the holding since the indiscriminate use of this "claim of right" doctrine in the past has rendered it a meaningless generality.[9] A better solution, perhaps, would be to determine whether the payment was taxable income when received by examining the primary purpose for which it was made.[10] This approach is not without precedent.[11] In fact, there is reason to believe that courts look to this test first in determining whether or not to fix liability by applying the label "claim of right." [12] Specifically the application of this test in the instant case, without changing the result, would lessen the possibility of disturbing the comparatively settled principle that part payments for property, under an option to purchase, are not taxable when received.

Income Taxation—Sale by Stockholders of Property Received in Liquidation of Corporation Held Taxable to Corporation—The president of a family corporation conducted negotiations for the sale of an apartment building, the corporation's sole asset. After agreement had been substantially reached, the stockholders (the family of the president) contracted that after causing the property to be conveyed to them by way of liquidation of the corporation, they would transfer it to the prospective purchaser. The Commissioner of Internal Revenue declared that

6. *E. g.,* Hirsch Improvement Co. v. Commissioner, 143 F. 2d 912 (2d Cir. 1944), *cert. denied,* 323 U. S. 750 (1944); Detroit Consolidated Theatres, Inc. v. Commissioner, 133 F. 2d 200 (6th Cir. 1942) (facts to be found in P-H 1941 BTA MEM. DEC. ¶ 41,403 (1941)).

7. Hirsch Improvement Co. v. Commissioner, 143 F. 2d 912 (2d Cir 1944), *cert. denied,* 323 U. S. 750 (1944).

8. An argument can be made that, even if there is a possibility that the payment will become a return of capital, it should not be taxed when received, since injustice might result. However, the government should not allow an unlikely contingency to cause a delay in its collection of taxes. First, because such things as the subsequent insolvency of the taxpayer might thwart the government in its attempt to collect the taxes, and also because it would, create a loophole for evasion of the taxation of all sums received in advance of the period of earnings.

9. For examples of how the courts have distinguished and disregarded the "claim of right" test, see Clinton Hotel v. Commissioner, 128 F. 2d 968 (5th Cir. 1942) (distinguished); Hirsch Improvement Co. v. Commissioner, 143 F. 2d 912 (2d Cir. 1944), *cert. denied,* 323 U. S. 750 (1944) (disregarded); Comment, *Taxing Unsettled Income: The "Claim of Right" Test,* 58 YALE L. J. 955 (1949); Note, 22 IND. L. J. 99 (1946).

10. This was the theory of the Tax Court in the instant case. Gilken Corp. v. Commissioner, 10 T. C. 445 (1948).

11. See, for example, the court's treatment of payment for security and future rent in Hirsch Improvement Co. v. Commissioner, 143 F. 2d 912 (2d Cir. 1944), *cert. denied,* 323 U. S. 750 (1944); and similarly, the court's treatment of state inflicted burdens on interstate commerce in South Pacific Co. v. Arizona *ex rel.* Sullivan, 325 U. S. 761 (1945).

12. See note 9 *supra.*

this was a corporate sale and asserted a deficiency in tax due based on the gain realized. The circuit court, affirming the decision of the Tax Court,[1] held that the corporate president must be assumed to have acted on behalf of the corporation, in spite of uncontradicted evidence that he represented the stockholders as individuals.[2] *Kaufmann v. Commissioner,* 175 F. 2d 28 (3rd Cir. 1949).

A distribution in kind by a corporation of its appreciated property as a liquidating dividend is not taxed as a realization of gain by the corporation,[3] but is taxed to each stockholder when the value of what he receives exceeds his stock investment.[4] On the other hand, a sale of the property by the corporation would subject it to a tax on the gain realized,[5] and the stockholder may also be subject to a tax on the distribution of the proceeds from the sale.[6] To avoid this double taxation, stockholders of many closely held corporations have followed practices similar to those employed in the instant case. The probability of the success of such practices has decreased sharply in recent years as the Commissioner, with the aid of the courts, has expanded the doctrine that the substance of transactions should not be disguised by mere formalities.[7] By use of this elastic dogma, technicalities have been seized upon to justify the allocation of the sales to the corporation,[8] without contravening the acknowledged right of taxpayers to decrease or entirely avoid the payment of taxes by following procedures which the law permits.[9] Substantial reliance has been placed on the corporate-negotiation theory, whereby if it could be shown that a major part of the successful negotiations were conducted by the corporation, subsequent distributions to the stockholders, followed by their transferring the property to the purchaser, will not have the effect of substituting the stockholders for the corporation as the true vendor.[10] Conversely, courts have refused to attach liability to corporations where there were no negotiations pending by either the corporation or stockholders when liquidation was initiated,[11] or where they have been convinced that irrespective of the time of negotiations, the sales were essentially those of the stockholders.[12]

1. 11 T. C. 483 (1948).

2. Only two witnesses were called. Mrs. Rose Kaufmann, one of the petitioners and stockholders, stated that Samuel Hyman, her father and corporate president, was acting for the stockholders as individuals. The other witness was the president of the purchasing corporation who testified that it was his impression that Mr. Hyman was acting for his wife and daughters. The Tax Court concluded that all witnesses could be implicitly believed. The circuit court observed, however, that Mr. Hyman was not called upon to refute the contention that he was acting for the corporation. See Wichita Terminal Elevator Co. v. Commissioner, 6 T. C. 1158, 1164 (1946) where the court noted that the taxpayer failed to produce as witnesses its officers who were qualified to testify concerning the facts in dispute. Undoubtedly, the failure of taxpayers to produce its most qualified personnel as witnesses has an adverse effect on their cases.

3. U. S. Treas. Reg. 111, § 29.22(a)-20 (1943).

4. INT. REV. CODE § 115(c).

5. U. S. Treas. Reg. 111, § 29.22(a)-18 (1943).

6. INT. REV. CODE §§ 115(a), 115(c).

7. Commissioner v. Court Holding Co., 324 U. S. 331 (1945).

8. Commissioner v. Court Holding Co., *supra;* Wichita Terminal Elevator Co. v. Commissioner, 162 F. 2d 513 (10th Cir. 1947); Fairfield Steamship Corp. v. Commissioner, 157 F. 2d 321 (2d Cir. 1946); Meurer Steel Barrel Co. v. Commissioner, 144 F. 2d 282 (3d Cir. 1944).

9. Gregory v. Helvering, 293 U. S. 465 (1935).

10. Commissioner v. Court Holding Co., *supra.*

11. Commissioner v. Falcon Co., 127 F. 2d 277 (5th Cir. 1942); Williams v. Commissioner, 3 T. C. 1002 (1944).

12. Howell Turpentine Co. v. Commissioner, 162 F. 2d 319 (5th Cir. 1947).

In the instant case, the evidence supported the taxpayer's contention that the president was acting for the stockholders as individuals.[13] All the stockholders consented to the arrangement, and it does not appear reasonable to state that the corporation was injured by being deprived of the sale, since the resulting proceeds would have been distributed to the stockholders. Therefore the court's contention that the president must be assumed to have acted on behalf of the corporation, because of the existing fiduciary relationship,[14] seems fallacious. However, its conclusion in allocating the sale to the corporation represents a realistic approach to the problem of enforcing congressional intent in the field of corporate taxation. In the absence of specific legislation indicating approval of the inequities that now exist in our tax law,[15] court decisions should have the effect of further equalizing the tax burden among all individuals. Rather than relying on the fiduciary relationship dogma, which could easily be circumvented,[16] the holding could have been more strongly supported by the theory that no tax-free liquidation occurred, since the stockholders, by being obligated to transfer the property upon receiving it, never had full ownership and dominion over it.[17] One should not be allowed to throw the tax gatherer off the scent by taking a meaningless step in routing the title from the corporation to the purchaser.[18] To hold otherwise would result in placing a premium on cleverly devised schemes designed, if assiduously followed, to subvert the purpose of the taxing statutes—a conclusion that would seriously impair the effective administration of the tax policies of Congress.

Labor Law—Wage-Hour Act—Stipulated Regular Rate of Pay Combined with Guaranteed Salary for Irregular Workweek—An employer hired certain clerks on a weekly guaranteed salary basis. There was an oral understanding, however, that this salary was computed at a stipulated rate per hour for 40 hours, with time and one-half for overtime. The guaranteed salary covered all amounts due for time and overtime up to 48 hours; if more than 48 hours were worked, additional compensation at time and one-half the stipulated rate was paid. The Wage-Hour Ad-

13. See note 2 *supra.*

14. 3 FLETCHER, CYCLOPEDIA CORPORATIONS § 838 (Rev. vol. 1947). "Directors and other officers, while not trustees in the technical sense in which that term is used, occupy a fiduciary relation to the stockholders as a body. . . . It is their duty to administer the corporate affairs for the common benefit of all stockholders, and exercise their best care, skill, and judgment in the management of the corporation solely in the interest of the corporation."

15. Stockholders of a corporation which is able to distribute liquidating dividends in kind have a definite tax advantage over those of corporations which must first sell their property and then distribute the proceeds from the sale. See notes 3-6 incl., *supra.*

16. An implication of the court decision is that if the stockholders were represented by a party who had no official connection with the corporation, the sale would not have been allocated to the corporation.

17. This proposition is being advanced by the Government in its petition for certiorari filed with the Supreme Court (October Term, 1949) in case of Cumberland Public Service Co. v. United States, 83 F. Supp. 843 (Ct. Cl. 1949). If the petition is granted, the subsequent decision by that court should aid substantially in clearing the air of uncertainty that currently prevails in this field of taxation. But see Magill, *Sales of Corporate Stock or Assets,* 47 COL. L. REV. 707, 717 (1947).

18. Income taxes cannot be avoided by methods, devises, anticipatory arrangements, or contracts which merely give ill-founded complexion to the reality of the transaction. Griffiths v. Commissioner, 308 U. S. 355 (1939); Lucas v. Earl, 281 U. S. 111 (1930).

ministrator challenged the validity of the contractual hourly rate, alleging that it was artificial, and not in accord with statutory requirements. In affirming a judgment dismissing the Administrator's complaint, the court ruled that the statutory "regular rate" of pay of these employees was the stipulated rate. *McComb v. Pacific & Atlantic Shippers Ass'n.*, 175 F. 2d 411 (7th Cir. 1949).

Section 7 (a) of the Fair Labor Standards Act requires employees working over 40 hours per week to be compensated for such excess hours at "not less than one and one-half times the regular rate" at which employed.[1] In the ordinary case, the "regular rate" is total weekly remuneration divided by the number of hours actually worked.[2] Moreover, where there is a guaranteed weekly wage without any express provision for an hourly rate, even though it was intended to include overtime, this rule applies and no effect is given to the guarantee.[3] Until recently the Wage-Hour Administrator has contended that the same rule applies notwithstanding a stipulation of an hourly rate, where the wage actually paid is in fact governed by the guarantee.[4] This contention was refuted by the Supreme Court in 1942 in *Walling v. Belo Corporation.*[5] Thereafter, however, the Administrator's position was strengthened by the language of three opinions refusing to give effect to stipulated hourly rates under constant wage plans that lacked an effective or fair guarantee.[6] Encouraged, in 1947 the Administrator carried to the Supreme Court a case in which the factual situation was indistinguishable from the *Belo* case; but the Court again applied the *Belo* doctrine, and held that a bona fide, contractual wage rate not less than the statutory minimum, although accompanied by a fair guarantee, may be regarded as the "regular rate" of pay.[7] This case should

1. The Act applies only to employees engaged in interstate commerce or in the production of goods for interstate commerce. 52 STAT. 1060 (1938), 29 U. S. C. §§ 203(b), 203(j), as amended Pub. L. No. 393, 81st Cong., 1st Sess. §§ 3(a), 3(b) (Oct. 26, 1949).

2. The Fair Labor Standards Act amendments define "regular rate" as including all remuneration for employment, except that certain types of payments, *e. g.*, Christmas gifts, are excluded. Pub. L. No. 393, 81st Cong., 1st Sess. § 7 (Oct. 26, 1949). Under the original Act, which contained no definition of "regular rate", the Supreme Court ruled that it means "the hourly rate actually paid for the normal, non-overtime workweek." Walling v. Helmerich & Payne, 323 U. S. 37, 40 (1944).

3. Overnight Motor Transportation Co. v. Missel, 316 U. S. 572 (1942).

4. To illustrate these rules: *Example 1.*—E, an employer, hires C, a clerk, at $52 for a workweek of 40 hours. C's regular rate of pay is $1.30 per hour [$52 ÷ 40]. *Example 2.*—E hires C at $52 per week, and the contract specifies that this wage is to cover all hours not in excess of 48 in any week. In this situation the regular rate will likewise be wage divided by hours worked, and no effect will be given to the guarantee. This is the *Overnight Trans. Co.* case, *supra. Example 3.*—E hires C at $52 per week, and the contract specifies that the regular rate of pay shall be $1.00 per hour. In this situation, if C ordinarily worked 48 hours, it is not likely that the Administrator would ever have questioned the bona fides of the contractual rate. On the other hand, if C usually worked only 40 hours per week, and only occasionally worked 48, in the past the Administrator would likely have contended that the stipulated rate was not the regular rate; and that for weeks in which C worked over 40 hours he should receive additional overtime compensation.

5. 316 U. S. 624 (1942). The Court's holding that a stipulated hourly rate may be regarded as the regular rate notwithstanding a fair guarantee of a minimum weekly wage has since become known as the *Belo* doctrine.

6. Walling v. Helmerich & Payne, *supra* (split day plan); Walling v. Youngerman-Reynolds Hardwood Co., 325 U. S. 419 (1945) (piece work plan); Walling v. Harnischfeger Corp., 325 U. S. 427 (1945) (piece work and incentive bonus plan).

7. Walling v. Halliburton Oil Well Cementing Co., 331 U. S. 17 (1947). Justices Black and Murphy dissented. In the *Belo* case, *supra,* Justices Black, Murphy, Reed and Douglas dissented.

have ended the Administrator's efforts to disregard stipulated wage rates where the basic requirements of the *Belo* doctrine were complied with. But the Administrator continued to challenge guaranteed wage plans differing in any material way in their factual background from the *Belo* case.[8] Thus, in the instant case the Administrator urged that the stipulated rate was not bona fide because it was based on oral misunderstandings without a written contract, and not necessitated by an inherent problem of widely fluctuating hours.

Since the decision in the instant case, the doctrine of the *Belo* case has been enacted into law.[9] Thus, it would seem the policy of Congress is to encourage guarantees which will give employees with irregular hours of work the security of a constant wage. The statute clearly legalizes a stipulated regular rate of pay, in excess of the minimum, if the workweek is irregular, the guarantee covers not more than 60 hours, and the contract is bona fide. The instant case would seem to indicate that the *Belo* doctrine will be broadly construed, and that a contractual rate is bona fide whenever the following elements are present: (a) strict observance and application of the stipulated rate in any situation where the guarantee does not apply;[10] (b) a reasonable number of instances in which the hours actually worked exceed the number necessary to earn the guaranteed wage, and payment of additional compensation therefor at 150% of the stipulated rate;[11] and (c) some evidence that the stipulated rate bear a fair relation to wage earning actualities, and is not a mere artifice to avoid payment of overtime.[12]

Landlord and Tenant—Federal Jurisdiction—Requirement of Jurisdictional Amount in Private Action under Rent Act—In an action by a tenant against his landlord under § 205, Housing and Rent Act of

8. See, in addition to the instant case, *e. g.*, McComb v. Sterling Ice & Cold Storage Co., 165 F. 2d 265 (10th Cir. 1947); McComb v. Utica Knitting Mills, 164 F. 2d 670 (2d Cir. 1947).

9. Pub. L. No. 393, 81st Cong., 1st Sess. § 7 (Oct. 26, 1949) (effective 90 days after enactment) provides: "No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of forty hours if such employee is employed pursuant to a bona fide individual contract, or pursuant to an agreement made as a result of collective bargaining by representatives of employees, if the duties of such employee necessitate irregular hours of work, and the contract or agreement (1) specifies a regular rate of pay of not less than the minimum hourly rate provided in section 6(a) and compensation at not less than one and one-half times such rate for all hours worked in excess of forty in any workweek, and (2) provides a weekly guaranty of pay for not more than sixty hours based on the rates so specified."

10. See, *e. g.*, 149 Madison Ave. Corp. v. Asselta, 331 U. S. 199 (1947) (failure to observe stipulated rate for part of week when hiring new employees).

11. In the *Sterling Ice & Cold Storage Co.* case, *supra*, the court refused to apply the *Belo* doctrine where the record did not show any such instances. In the instant case the Government asserted that less than 10% of the man-weeks of work exceeded 48 hours, the time covered by the guarantee.

12. The statutory enactment appears to extend the *Belo* doctrine to preclude any question of bona fides when the regular rate is stipulated pursuant to a collective bargaining agreement. See note 9 *supra*. On the other hand, it narrows the *Belo* doctrine by providing that the guarantee may not cover more than 60 hours. *Cf.* the *Halliburton* case, *supra*, in which more than 84 hours had to be worked before extra compensation in addition to the guarantee had to be paid.

1947,[1] allowing treble damages for alleged overcharges of rent, the circuit court denied defendant's motion to dismiss the complaint on the ground that the district court was without jurisdiction although the amount involved was less than $3000. The court held that the Housing and Rent Act contains a grant of general jurisdiction to federal courts over actions to recover treble damages without regard to the jurisdictional amount. *Adler v. Northern Hotel Co.*, 175 F. 2d 619 (7th Cir. 1949).

Section 205 of the Housing and Rent Act provides that a tenant may recover three times the amount of an intentional overcharge and "Suit to recover such amount may be brought in any Federal, State or Territorial court of competent jurisdiction within one year after the date of such violation." The problem of statutory construction presented is whether "competent jurisdiction" restricts federal jurisdiction to cases where the amount in controversy exceeds $3000. Congress has the power to authorize a suit arising under a federal law to be brought in any inferior federal court irrespective of the amount in controversy.[2] For example, the district courts have original jurisdiction of civil actions arising under any act of Congress regulating commerce[3] or relating to patents, copyrights, and trademarks[4] without regard to the amount involved. Likewise, the original act imposing rent controls[5] provided not only that such treble damage actions might be brought "in any court of competent jurisdiction" but also that the district courts had jurisdiction concurrently with State courts ". . . of *all* other proceedings . . ."[6] By virtue of this language tenants recovered damages in district courts although the amounts in controversy did not exceed $3000.[7] It is contended that the modified language of the subsequent Housing and Rent Act of 1947 makes the district courts unavailable to recover small claims. The majority, holding that tenants may recover rental overcharges in district courts irrespective of the amount in controversy, construes the statute so as to effect the Congressional objective, an effective remedy for overcharges.[8]

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1. 61 STAT. 199 (1948), 50 U. S. C. § 1895 (Supp. 1949). Note that this discussion concerns suits by private parties rather than actions by the Housing Expediter on behalf of the Government, as authorized by the Housing and Rent Act of 1949, Pub. L. No. 31, 81st Cong., 1st Sess. § 204(a). There are different considerations if the suit is by a public officer; United States v. Heller, 18 U. S. L. WEEK 2191 (U. S. Oct. 10, 1949); *see* Fields v. Washington, 173 F. 2d 701, 703 (3d Cir. 1949); Porter v. Montgomery, 163 F. 2d 211, 215 (3d Cir. 1947).

2. 28 U. S. C. § 1331 (1948); *see* Robertson v. Railroad Labor Board, 268 U. S. 619, 622 (1925).

3. 28 U. S. C. § 1337 (1948); Louisville & Nashville R. Co. v. Rice, 247 U. S. 201 (1918). *But cf.* Stewart v. Hickman, 36 F. Supp. 861, 865 (W. D. Mo. 1941).

4. 28 U. S. C. § 1338 (1948); Kasch v. Cliett, 247 Fed. 169 (5th Cir. 1924).

5. EMERGENCY PRICE CONTROL ACT OF 1942, 56 STAT. 23 (1942), as amended, 50 U. S. C. § 901 *et seq.* (1946).

6. § 205(c)(e) (italics supplied), 56 STAT. 23, 33 (1942), as amended, 50 U. S. C. § 925 (1946).

7. The Emergency Price Control Act of 1942, as amended, *supra* note 6, continued this right to a treble damage action at least until June 30, 1947 [PRICE CONTROL EXTENSION ACT OF 1946, 60 STAT. 664, 50 U. S. C. § 966 (1946)]. Powell v. Rhine, 71 F. Supp. 953 (W. D. Pa. 1947); see, also, Strickland v. Sellers, 78 F. Supp. 274 (N. D. Tex. 1948).

8. The question has divided the lower federal courts. See Adams v. Backlund, 81 F. Supp. 643 (1948). *Contra:* Fields v. Washington, 173 F. 2d 701 (3d Cir. 1949); McCrae v. Johnson, 84 F. Supp. 220 (D. Md. 1949). Another possible factor in the instant decision is the fact that many cases have been filed in district courts under the later act where the amount of damages claimed is less than $3000. A substantial amount of the claims pending would be lost by a denial of jurisdiction under § 205 because the 1947 Act allows damage suits only within one year after the date of the violation.

The significant dissenting opinion by Judge Minton, now Associate Justice, United States Supreme Court, objects to disregarding the plain meaning of the statute, *i. e.*, the federal court must be one of "competent jurisdiction" which by definition requires the amount in controversy to exceed $3000.[9] This literal approach to construction obviates the necessity for looking to the policy of Congress. The dogma is that if the language is plain and allows only one meaning, the court may not look to other evidence of intent as an aid to construction, for there is nothing to construe.[10] But words are at best inexact symbols of meaning;[11] ambiguity is inherent in their nature. If we consider the words alone, actually there is no such thing as the plain meaning of a statute. Only by a consideration of all evidence of intention can the court fulfill its obligation to give effect to the determination of policy signified by a Congressional act.[12] Giving words a literal meaning without regard to the purpose to be effectuated is as much judicial legislation as is the substitution of a judge's own conception of policy for that manifested by the legislature. Congress, in giving the overcharged tenant a right to sue for treble damages, intended to provide a necessary incentive to tenant cooperation in discouraging violations of rent controls.[13] In many localities suits could be tried with less delay in federal than in state courts; moreover, local reluctance to enforce federally created rights in regard to price and rent control[14] made a choice of forum a desirable aid to enforcement. The amounts involved in rental overcharges are admittedly small, both by nature and because a suit may be brought only within one year of the violation. If "competent jurisdiction" is construed to impose the jurisdictional amount, suits in federal courts are reduced to nil.[15] Nothing in the legislative history of the Housing and Rent Act suggests any intent to change the previous remedy of an overcharged tenant by barring access to federal court unless his claim exceeded $3000. It is reasonable to infer that by ". . . Federal court . . . of competent jurisdiction" Congress designated district courts of general jurisdiction rather than a federal court of appeal or the Court of Claims, but did not impose a jurisdictional amount.[16] This interpretation in accord with the expressed policy of Congress is preferable to a literal construction

9. 28 U. S. C. § 1331 (1948); *see* Stewart v. Hickman, 36 F. Supp. 861, 865 (W. D. Mo. 1941).

10. *E. g.*, Van Camp & Sons v. American Can Co., 278 U. S. 245, 253 (1929); Work v. United States, 295 Fed. 225, 227 (D. C. Cir. 1924); Caminetti v. United States, 242 U. S. 470, 485 (1912). *But cf.* Boston Sand & Gravel Co. v. United States, 278 U. S. 41 (1928).

11. Chafee, *Disorderly Conduct of Words*, 41 COL. L. REV. 381 (1941).

12. *See* United States v. Dickerson, 310 U. S. 554, 562 (1930); Ozawa v. United States, 260 U. S. 178, 194 (1922); Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COL. L. REV. 527 (1947).

13. *See* Bowles v. American Stores, 139 F. 2d 377, 379 (D. C. Cir. 1943), *cert. denied*, 322 U. S. 730 (1944). About 1000 private damage suits were terminated in district courts in the fiscal year 1947. ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 75 (1947).

14. See Testa v. Katt, 71 R. I. 472, 47 A. 2d 312 (1946) for illustration of state reluctance to take on enforcement of federally created rights. The state Supreme Court reversed a judgment for treble damages under the Emergency Price Control Act, § 205 (c) on the ground that the suit was for a penalty based on a statute of a foreign sovereign and could not be maintained in the state courts. This was reversed on appeal to the United States Supreme Court, 330 U. S. 386 (1947).

15. In order for a claim to amount to $3000, it is necessary that the monthly overcharge be over $80; this is extremely uncommon.

16. "Conmpetent jurisdiction" as it modifies State or Territorial courts may impose the jurisdictional amount since a right arising under a federal act may be enforced as of right in state courts only if their jurisdiction as prescribed by local laws is adequate to the occasion. Seceond Employers' Liability Cases, 223 U. S. 1 (1911).

of the words "competent jurisdiction" out of context. When the "plain meaning" leads to a futile result or an unreasonable one, the court should look beyond the words to the purpose of the act.[17]

Partnership—Distribution of Deceased Partner's Interest in Firm Realty Under the Uniform Partnership Act—Intestate had been a partner in a firm which owned real estate. An infant heir claimed that intestate's total interest in the land descended to her. The widow claimed a share in the land on the ground that intestate's interest was personalty, subject to the laws of distribution. The court, in sustaining the claim of the widow, held that the legislature, in adopting the Uniform Partnership Act, intended that all partnership property should be distributed as personalty.[1] *Cultura v. Cultura,* 221 S. W. 2d 533 (Tenn. 1949).

Prior to the enactment of the Uniform Partnership Act, the prevailing view in America was that on dissolution of a partnership, a deceased partner's interest in real estate descended to his heirs.[2] In equity, partnership realty was treated as personalty so far as it was necessary for paying partnership debts and adjusting affairs. But as soon as winding up was complete, any remaining real estate or residue from the sale thereof resumed its character as realty.[3] This equitable conversion pro tanto was enforced to give the surviving partners access to firm realty since legal title passed directly to the heirs. There were two exceptions to this rule. If the firm were engaged in land speculation[4] or if it were the intention of the partners that the realty should be treated as personalty,[5] there was said to be an "out and out" conversion, *i. e.,* partnership realty was regarded as personalty for all purposes, including descent and distribution. In England and a few states, the rule of "out and out" conversion was applied in all situations.[6] It was said that the surviving partner "must have an absolute and unconditional property and dominion over the estate of the firm" to wind up affairs satisfactorily.[7] After the adoption of the Uniform Partnership Act, the rule in some states was uncertain.[8] A Pennsylvania court, the first to construe the Act, held that §§ 25 and 26 clearly demand that the English rule of "out and out" conversion be fol-

17. See Chatwin v. United States, 326 U. S. 455 (1945); United States v. American Trucking Associations, 310 U. S. 534, 542 (1940).

1. UNIFORM PARTNERSHIP ACT §§ 25(2)(d), 25(2)(e), 26, 38(1).

2. *E. g.,* Shearer v. Shearer, 98 Mass. 107 (1867); Foster's Appeal, 74 Pa. 391, 15 Am. Rep. 553 (1874); Williamson v. Fontain, 66 Tenn. (7 Bax.) 212 (1874). See Note, 25 A. L. R. 389, 390 (1923).

3. See note 2 *supra.*

4. *E. g.,* Nicoll v. Ogden, 29 Ill. 323, 81 Am. Dec. 311 (1862); Patrick v. Patrick, 71 N. J. Eq. 347, 63 Atl. 848 (Ch. 1906).

5. Maddock v. Astbury, 32 N. J. Eq. 181 (Ch. 1880); Buckley v. Doig, 188 N. Y. 238, 80 N. E. 913 (1907).

6. England adopted the rule of "out and out" conversion by decision and by statute. Broom v. Broom, 3 Myl. & K. 443, 40 Eng. Rep. 169 (Ch. 1834); Partnership Act, 1890, 53 & 54 VICT., c. 39, § 22. Ohio, South Dakota, and Virginia had followed the English rule. See Note, 25 A. L. R. 389, 408 (1923).

7. Burdick, *Partnership Realty,* 9 COL. L. REV. 197, 203 (1909).

8. By the year 1949, twenty-eight states had adopted the Uniform Partnership Act. Tennessee adopted the Act in 1917. See 7 UNIFORM LAWS ANN. xv (1949).

lowed.[9] However, in affirming the decision, the Supreme Court of Pennsylvania refused to rely on the Act, holding that the parties intended the realty to be regarded as personalty.[10] Although a Tennessee case said that the Act did not affect the previous law,[11] decisions in other states and the instant case in Tennessee have construed the Act as did the lower court in Pennsylvania.[12]

It was clearly the intention of Dean Lewis, the draftsman of the Act, that firm realty should be treated as personalty for all purposes. He wrote, "This provision (§ 26) reverses the rule . . . of *Shearer v. Shearer* which has been followed in most American jurisdictions." [13] In following the English rule, recognition is given to business convenience and practicality. Also, the method of approach to the problem of distribution of partnership realty is now clear and simple. A partner is co-owner of partnership property, holding as a tenant in partnership and the incidents of such an interest are listed in the Act.[14] There is no longer need for squeezing the tenancy of a partner into the term "tenancy in common" and then adopting fictional conversions to obtain the desired legal consequences. Nor do we have to adopt the "entity" theory of partnership in order that a partner's interest may be called a chose in action against the "entity," and therefore personal property.[15]

Trade-Marks and Trade Names—Laches as a Defense Where There Has Been No Interim Reliance—In 1908 Anheuser-Busch sought an injunction to restrain defendant's use of his trade name "Budweiser," but discontinued the action. In 1940 it brought the instant action for the same purpose. In the interim the plaintiff had successfully prevented others from using the same name and had spent over thirty five million dollars in creating good will, while the defendant's production and sales remained steady and its advertising expenditures small.[1] The trial court granted the injunction, but the circuit court, in reversing the decree, held that the prolonged delay in bringing the action conferred immunity on the defendant from the present suit. *Anheuser-Busch, Inc. v. Du Bois Brewing Co.*, 175 F. 2d 370 (3d Cir. 1949).

In suits for unfair competition it is generally held that delay in bringing suit, even though prolonged, does not constitute a complete defense,

9. *In re* Hall's Estate, 28 Pa. Dist. 311 (1918), *aff'd*, 266 Pa. 312, 109 Atl. 697 (1920). UNIFORM PARTNERSHIP ACT § 25(2)(d) (title to firm property vests in the surviving partner), § 25(2)(e) (a partner's right to partnership property is not subject to dower, curtesy, or allowances), § 26 (a partner's interest in the partnership is his share of the profits and surplus, and the same is personal property).

10. *In re* Hall's Estate, *supra*.

11. Marks v. Marks, 1 Tenn. App. 436 (1925).

12. Wharf v. Wharf, 306 Ill. 79, 137 N. E. 446 (1922); Hankey v. French, 281 Mich. 454, 275 N. W. 206 (1937).

13. Lewis, *The Uniform Partnership Act*, 24 YALE L. J. 617, 637 (1915).

14. UNIFORM PARTNERSHIP ACT § 25.

15. See Burdick, *supra* note 7, at 216.

1. Defendant's plant capacity had not been increased since before 1909. Its sales of "Budweiser" beer were only 8 to 12% of total bottle sales and 8 to 30% of total barrel sales. Average advertising expenditures for *all* of its products for the periods 1909 to 1919 and 1933 to 1945 was $11,500 per year, but the defendant did not show what part of this was allocated to his "Budweiser." When compared to defendant's sales of $1,862,174 in 1945 the amounts spent for advertising seem insignificant. Nothing else was shown by the defendant to prove a change in position in reliance on plaintiff's inaction. See findings of fact by trial judge, 73 F. Supp. 338 (W. D. Pa. 1947).

although it may bar an accounting or preliminary injunction.[2] The reasoning behind this rule seems to be that since unfair competition is a continuing wrong, the evidence of the injury to the plaintiff is kept fresh.[3] Thus, one of the basic reasons for which the statute of limitations makes delay a defense is satisfied. The denial of an accounting is a convenient and adequate punishment for the plaintiff's unexcused delay.[4] The cases show that in addition to the passage of time the defendant must prove facts approaching an estoppel, *i. e.*, a change in the defendant's position caused by the plaintiff's failure to act.[5] In such a case there is both a personal and social interest in preserving the value of the defendant's efforts and expenditures, and this may tip the balance of the equities in favor of the defendant.[6] The present case is unique in the extreme length of the delay and in the unchanged position of the defendant throughout the period. The dissenting judge could see no unfairness to the defendant in granting the injunction since he had spent no money or otherwise committed himself in reliance on plaintiff's delay. The majority, however, felt that a delay so prolonged would under any circumstances bar the plaintiff from equitable relief.

The effect of denying injunctive relief in this case is to permit the existence of two "Budweiser" beers side by side, a condition likely to cause confusion in the minds of the public. The court could have enjoined this deception by adopting the rule that mere delay is not a defense. However, there is a growing belief that the enforcement of trade name rights results in more injury to the consuming public by restricting free competition[7] and raising the price of goods through wasteful advertising [8] than is caused by allowing such confusion to continue. The judicial manifestation of the growing unfriendly attitude toward legal protection against unfair competition may be seen in a reluctance to enlarge the scope of the protection

2. Saxlehner v. Eisner, 179 U. S. 19 (1900); Menendez v. Holt, 128 U. S. 514 (1888); McLean v. Fleming, 96 U. S. 245 (1877); Consolidated Home Specialties Co. v. Plotkin, 358 Pa. 14, 55 A. 2d 404 (1947); Klepser v. Furry, 289 Pa. 152, 159, 137 Atl. 175, 177 (1927); 2 NIMS, UNFAIR COMPETITION AND TRADE-MARKS §§ 409, 413 (4th ed. 1947); RESTATEMENT, TORTS § 751, comment *d* (1938).

3. Reid, Murdoch and Co. v. H. P. Coffee Co., 48 F. 2d 817, 820 (8th Cir. 1931).

4. DERENBERG, TRADE-MARK PROTECTION AND UNFAIR TRADING 649 (1936).

5. Menendez v. Holt, 128 U. S. 514, 523 (1888) (The Court denied recovery of damages for prior infringement because of delay, but said, "There is nothing here in the nature of an estoppel, nothing which renders it inequitable to arrest at this stage any further invasion of complainant's rights." The injunction was granted); Procter and Gamble Co. v. J. L. Prescott Co., 102 F. 2d 773 (3d Cir. 1939) (8 year delay, large expenditures by defendant for advertising; injunction denied. The court said that had plaintiff sued before such expenditures were made, it would have been entitled to injunctive relief); Reid, Murdoch and Co. v. H. P. Coffee Co., 48 F. 2d 817 (8th Cir. 1931) (5 year delay, no expenditures by defendant; injunction granted); see also Rothman v. Grayhound Corp., 175 F. 2d 893 (4th Cir. 1949); Standard Oil Co. of Colorado v. Standard Oil Co., 72 F. 2d 524, 527 (10th Cir. 1934); Beattie Mfg. Co. v. Smith, 275 Fed. 164, 172 (2d Cir. 1921); 2 CALLMAN, THE LAW OF UNFAIR COMPETITION AND TRADE-MARKS §§ 87.3(b)-87.3(b)(3) (1945).

6. Procter and Gamble Co. v. J. L. Prescott Co., 102 F. 2d 773 (3d Cir. 1939); Banker v. Ford Motor Co., 69 F. 2d 665 (3d Cir. 1934); Valvoline Oil Co. v. Havoline Oil Co., 211 Fed. 189 (S. D. N. Y. 1913). *But cf.* Layton Pure Food Co. v. Church and Dwight Co., 182 Fed. 35, 41 (8th Cir. 1910).

7. Zlinkoff, *Monopoly v. Competition*, 53 YALE L. J. 514, 528 (1944); CHAMBERLIN, THEORY OF MONOPOLISTIC COMPETITION 246-50 (5th ed. 1946). *Cf.* National Fruit Products Co. v. Dwinnel-Wright Co., 47 F. Supp. 499 (D. Mass. 1942); also Callman, *He Who Reaps Where He Has Not Sown: Unjust Erichment in the Law of Unfair Competition*, 55 HARV. L. REV. 595 (1938).

8. See Bourjois v. Hermida Laboratories, 106 F. 2d 174 (3d Cir. 1939); Brown, *Advertising and the Public Interest*, 57 YALE L. J. 1165 (1948).

given to trade names,[9] in increasing the burden on the plaintiff of proving likelihood of confusion of source,[10] and in lessening the defendant's burden of establishing a defense.[11] Liberal use of the doctrine of laches presents to the court desiring to advance free competition a tool for limiting the protection of a trade name by denying injunctive relief.

Wills—Inscription at Top of Page as a Signature of a Holographic Will—Testatrix, Ella McNair, executed an instrument in her own handwriting which she began, "I, Ella McNair, . . . do hereby make my last will." The instrument was comprised of three sheets, and at the top of each testatrix wrote, "Will of Ella McNair", or, "Will, Ella McNair". After numerous bequests, the writing ends abruptly in the middle of the third page. The evdence tended strongly to show that the instrument had been written in one sitting. It had been completed nineteen months before testatrix's death, and was found in an envelope on which she had written, "Will of Ella McNair." The court held that the instrument was "signed" by the testatrix,[1] as required by statute.[2] In re *McNair's Estate,* 38 N. W. 2d 449 (S. D. 1949).

A few state statutes require that a holographic will be signed, or subscribed, at the end of the instrument.[3] However, the majority require only that it be "signed"; the courts of most of these jurisdictions have followed an early English case,[4] holding that the place of the signature is immaterial.[5] The doctrine which developed from this case was that the really material factor was the intention that it serve as the testator's signature,[6] and not merely as a *descriptio personae.* The courts still profess to make this the focal point of their decision, but the trend has been to make the determinative test whether the testator intended the instrument

9. Eastern Wine Corp. v. Winslow-Warren, 137 F. 2d 955 (2d Cir. 1943); S. C. Johnson and Sons v. Johnson, 116 F. 2d 427 (2d Cir. 1940); see Triangle Publications v. Rohrlich, 167 F. 2d 969, 981 (2d Cir. 1948) (dissenting opinion).

10. California Fruit Growers Exchange v. Sunkist Baking Co., 166 F. 2d 971 (7th Cir. 1947).

11. Zlinkoff, *supra* note 7, at 531 states, "With increasing consistency the circuit courts have rendered judgments for defendants, reversing district courts' rulings awarding relief to plaintiffs, and restricting and casting doubt on their own decisions in the earlier decade. Examination of all the circuit court cases in this field reveals that the number in favor of the defendant greatly preponderates."

1. Judge Roberts and Judge Sickel dissented on the grounds that there was no language in the document adopting the name as a signature for purposes of execution, and that the form and contents did not raise any positive inference that testator so intended it.

2. S. D. Code § 56.0209 (1939) defines a holographic will as follows: "An holographic will is one that is entirely written, dated, and signed by the hand of the testator himself. . . . and need not be witnessed."

3. Borchers v. Borchers, 145 Ark. 426, 224 S. W. 729 (1920); Graham v. Edwards, 162 Ky. 771, 173 S. W. 127 (1915); Kimmel's Estate, 278 Pa. 435, 123 Atl. 405 (1924).

4. Lemayne v. Stanley, 3 Lev. 1, 83 Eng. Rep. 545 (1681).

5. *In re* Henderson's Estate, 196 Cal. 623. 238 Pac. 938 (1925); *Ex parte* Cardoza, 135 Md. 407, 109 Atl. 93 (1919); Reagan v. Stanley, 11 Lea 316 (Tenn. 1883); Lawson v. Dawson's Estate, 21 Tex. Civ. App. 361, 53 S. W. 64 (1899); Murguiondo v. Nowlan's Ex'r., 115 Va. 160, 78 S. E. 600 (1913); *see In re* Brandow's Estate, 59 S. D. 364, 365, 240 N. W. 323, 324 (1932).

6. *In re* Devlin's Estate, 198 Cal. 721, 247 Pac. 577 (1926); *In re* Fisher's Estate, 47 Idaho 668, 279 Pac. 291 (1929); Rook v. Wilson, 142 Ind. 24, 41 N. E. 311 (1895); Forrest v. Turner, 146 Va. 734, 133 S. E. 69 (1926).

to be his will.[7] Moreover, there is a split of authority as to what constitutes expression of the requisite intent.[8] The "true rule" as laid down in *Estate of Manchester*[9] is that it must appear on the face of the document. Since such an expression is rare, this rule has often been paid little more than lip service. This is especially true when the court is trying to discover whether or not the testator intended the paper to be his will.[10] These courts have looked rather at such features as the time and place of writing, the mental capacity or physical condition of the author, the phraseology of the writing, and whether or not it purported to be a more or less complete disposition of the author's holdings.[11] The court in the instant case has clearly followed this trend, since it seems doubtful that the signature here was intended as one of authentication, as is required by the statute.

The purpose of admitting holographic wills to probate is to permit those who either cannot get competent advice, or those who wish to keep secret the disposition of their property, to make a valid will. The formalities as to execution should effectuate this purpose and not defeat it.[12] Granted, there should be some method of determining whether the testator actually made a will and was not merely thinking about it on paper. However, the act of signing should not be the *sine qua non,* because that would often defeat the intent of the testator, who is almost always totally unfamiliar with testamentary statutes.[13] Nevertheless, courts, by insisting on a strict interpretation of and literal compliance with the statute, often frustrate the genuine intention of the testator.[14] The courts are not the only offenders, for legislatures have persisted in making the execution of a will depend on a series of small acts described in ambiguous terms. Because each instrument presented for probate has different features and a different background, effectual *detailed* legislation in this field seems impossible. Accordingly, a substantial improvement could be made by delegating to the courts a greater degree of discretion.[15] Until such a legis-

7. *In re* Gardener's Estate, 84 Cal. App. 2d 394, 190 P. 2d 629 (1948); *In re* Irvine's Estate, 114 Mont. 577, 139 P. 2d 489 (1943); *In re* Wallace's Will, 227 N. C. 459, 42 S. E. 2d 520 (1947). *Contra:* Elrod v. Purdin, 196 Okla. 120, 163 P. 2d 209 (1945).

8. Mechem, *The Rule in Lemayne v. Stanley,* 29 MICH. L. REV. 685 (1931); 28 MICH. L. REV. 355 (1930).

9. 174 Cal. 417, 163 Pac. 358 (1917). This has been made the subject of statutes in Va. and W. Va. See Bordwell, *The Statute Law of Wills,* 14 IOWA L. REV. 1, 13 (1928).

10. See the dubious discoveries of the proper context in Estate of McMahon, 174 Cal. 423, 163 Pac. 669 (1917); Dinning v. Dinning, 102 Va. 467, 46 S. E. 473 (1904); Mechem, *supra* note 8, at 696.

11. *See In re* McNair's Estate, 38 N. W. 2d 449, 455 (1949).

12. *See* Alexander v. Johnston, 171 N. C. 468, 469, 88 S. E. 785, 786 (1916).

13. "In the case of a holographic will, the crucial moment for the testator may not be that at which he decides to sign his name or not, but rather that subsequent moment when he decides whether to put the paper in the fire or in the safe." Mechem, *supra* note 8, at 690.

14. The court in *In re* Tyrell's Estate, 17 Ariz. 418, 419, 153 Pac. 767, 768 (1915) quotes from an earlier case, "It may happen, even frequently, that genuine wills, namely, wills truly expressing the intentions of the testators, are made without observation of the required forms; and whenever that happens, the genuine intention is frustrated by the act of the Legislature, of which the general object is to give effect to the intention. . . ." See Mechem, *supra* note 8, at 697.

15. Mechem, *Why Not a Modern Wills Act?,* 33 IOWA L. REV. 501, 503 (1948). ". . . the philosophy should be to impose only such requirements as seem so unmistakably essential to a safe will-making process as to justify running the known risk of defeating meritorious wills through failure of testators to know or comply with the requirements. . . . careful attention should be given to the known habits of testators (particularly untutored ones) as illustrated by the thousands of cases decided since 1677."

lative policy is forthcoming, the courts should use every power to treat these instruments liberally in order to avoid unjust or absurd consequences and to give effect to the testator's genuine attempt to dispose of his property.[16] By admitting a will to probate despite its questionable nature if viewed strictly from the point of view of the statute, the instant case adds impetus to a movement toward a more reasonable and more intelligent treatment of holographic wills.

16. Thrift Trust Co. v. White, 90 Ind. App. 116, 118, 167 N. E. 141, 143 (1929). "Good faith wills are solemn instruments, not to be set aside by the courts because of mere irregularities as to form; they should be upheld when it is possible within the law to do so." *Cf.* Young v. Whitehall Co., 229 N. C. 360, 49 S. E. 2d 797, 801 (1948). ". . . the court should consider the language of the statute, the mischiefs sought to be avoided, and the remedies intended to be applied. . . . Furthermore, if words will permit, the court should not adopt a construction which will lead to unjust, oppressive, or absurd consequences."